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NOTES

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Court-martial judgments have never been subject to direct review by civilian courts.[1] Like those convicted in state courts, however, servicemembers who are "in custody" can obtain collateral review of their convictions by petitioning for habeas corpus in the federal courts.[2] But, unlike state courts, courts-martial frequently impose sentences that do not satisfy the habeas "custody" requirement[3]—in particular, punitive discharges, reductions in rank, and forfeitures of pay. In response to the needs of convicted servicemembers not sentenced to custody, the lower federal courts generally[4] have begun to review court-martial convictions collaterally in suits for mandamus,[5] back pay,[6] and, less frequently, declaratory and injunctive

1. Noyd v. Bond, 395 U.S. 683, 694 (1969); *In re* Yamashita, 327 U.S. 1, 8 (1946); *In re* Vidal, 179 U.S. 126, 127 (1900); *Ex parte* Valldigham, 68 U.S. (1 Wall.) 243, 251, 253 (1863); W. WINTHROP, MILITARY LAW AND PRECEDENTS 50 (2d rev. ed. 1920). The Supreme Court continues to ignore petitions for direct review. *See, e.g.*, Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967), *cert. denied*, 389 U.S. 1049 (1968); United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964), *motion for leave to file petition for writ of certiorari denied*, 380 U.S. 970 (1965). The Court of Appeals for the District of Columbia Circuit has disclaimed jurisdiction directly to review decisions of the Court of Military Appeals. *See* Shaw v. United States, 209 F.2d 811 (1954).

2. *E.g.*, Parker v. Levy, 417 U.S. 733 (1974); Gosa v. Mayden, 413 U.S. 665 (1973); Gusik v. Schilder, 340 U.S. 128 (1950). As used in this Note, the term "federal court" includes the Court of Claims.

3. *See* 28 U.S.C. § 2241(c) (1970). On the "custody" requirement, see Cushman, *The "Custody" Requirement for Habeas Corpus*, 50 MIL. L. REV. 1 (1970). The considerable relaxation of this requirement in civilian courts, *see, e.g.*, Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973) (habeas action lies in district other than one in which petitioner is confined); Carafas v. LaVallee, 391 U.S. 234 (1968) (habeas action lies even if petitioner released after filing petition); Peyton v. Rowe, 391 U.S. 54 (1968) (challenge to future custody); Jones v. Cunningham, 371 U.S. 236 (1963) (petitioner on parole), has not been paralleled in military cases. *See, e.g.*, Kanewske v. Nitze, 383 F.2d 388 (9th Cir. 1967) (bad-conduct discharge does not satisfy custody requirement). However, there has been some indication of a loosening of requirements and speculation that a liberalizing trend will occur. *See* Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1, 16-18 (1971). For a discussion of possible expansion of the custody requirement, see text at notes 224-26 *infra*.

4. For exceptions, see, for example, United States v. Carney, 406 F.2d 1328 (2d Cir. 1969); Goldstein v. Johnson, 184 F.2d 342 (D.C. Cir.), *cert. denied*, 340 U.S. 879 (1950); Stock v. Department of the Air Force, 186 F.2d 968 (4th Cir. 1950); Alley v. Chief, Finance Center, 167 F. Supp. 303 (S.D. Ind. 1958) (dictum). *See also* Davies v. Resor, 445 F.2d 1331 (1st Cir. 1971); Davies v. Clifford, 393 F.2d 496 (1st Cir. 1968).

5. *E.g.*, Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971); Angle v. Laird, 429 F.2d 892 (10th Cir. 1970), *cert. denied*, 401 U.S. 918 (1971); Ragoni v. United States, 424 F.2d 261 (3d Cir. 1970); Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965). *But see* United States v. Carney, 406 F.2d 1328 (2d Cir. 1969).

6. The primary forum for back-pay suits is the Court of Claims. *E.g.*, Augenblick v. United States, 509 F.2d 1157 (Ct. Cl. 1975); Artis v. United States, 506 F.2d 1387

relief.[7] While the Supreme Court has long upheld the availability of the constitutionally protected[8] habeas writ,[9] until its recent decision in *Schlesinger v. Councilman*[10] it had expressly withheld judgment on the availability of the newer and more jurisdictionally uncertain nonhabeas forms of review.[11]

(Ct. Cl. 1974); Taylor v. United States, 199 Ct. Cl. 171 (1972); Robb v. United States, 456 F.2d 768 (Ct. Cl. 1972); Hagarty v. United States, 449 F.2d 352 (Ct. Cl. 1971); Gallagher v. United States, 423 F.2d 1371 (Ct. Cl.), *cert. denied*, 400 U.S. 849 (1970); Gearinger v. United States, 412 F.2d 862 (Ct. Cl. 1969).

Tucker Act § 2, 28 U.S.C. § 1346(a)(2) (1970), gives district courts jurisdiction concurrent with the Court of Claims over suits against the United States where the amount in controversy is less than $10,000. Back-pay suits in federal courts generally have been dismissed because the amount in controversy is greater than $10,000. *E.g.*, Mathis v. Laird, 483 F.2d 943, 944 (9th Cir. 1973); Carter v. Seamans, 411 F.2d 767, 771-72 (5th Cir. 1969). Mandamus is generally unavailable to compel the return of back pay because an adequate legal remedy exists in the Court of Claims. Carter v. Seamans, 411 F.2d 767, 773-74 (5th Cir. 1969); Parrish v. Seamans, 343 F. Supp. 1087, 1094 (D.S.C. 1972), *affd.*, 485 F.2d 571 (4th Cir. 1973). *But see* Brown v. United States, 365 F. Supp. 328, 338 (E.D. Pa. 1973), *affd.*, 508 F.2d 618 (3d Cir. 1975) ("This Court does not believe that it would be proper to mandamus the payment of unliquidated or disputed sums in the nature of damages. However, this Court does believe that it can mandamus the return of fines or forfeitures levied directly within the four corners of an invalid judgment by a court-martial without jurisdiction.").

7. *E.g.*, Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973), *revd. on other grounds*, 418 U.S. 676 (1974); Cole v. Laird, 468 F.2d 829 (5th Cir. 1972); Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966).

8. It is doubtful whether Congress could have withdrawn the privilege of habeas corpus from those convicted by courts-martial. The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. It has been suggested that Congress was not constitutionally required to establish any federal habeas jurisdiction, leaving the provision of habeas review entirely to the states. If so, the suspension clause would be read simply to protect state habeas proceedings from federal intervention. *See Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1266-67 (1970) [hereinafter *Developments*]. This would indicate that Congress could withdraw the habeas privilege from servicemembers convicted by courts-martial. *Cf.* Marchese v. United States, 304 F.2d 154, 156 (9th Cir. 1962) (suspension clause protects only rights of habeas as of 1789), *citing* Jones v. Squier, 195 F.2d 179, 181 (9th Cir. 1952). However, the same article finds a constitutional requirement that there be some court with habeas jurisdiction over federal prisoners, *Developments*, *supra*, at 1267, and sees merit in the argument "that once Congress has established federal courts with the power to enforce federal law, it may not—as a matter of due process—withhold habeas jurisdiction over federal prisoners." *Id.* at 1271-72. The cases support the conclusion that the power of Congress to limit the availability of habeas relief is narrowly prescribed. *See* Parisi v. Davidson, 405 U.S. 34, 48 (1972) (Douglas, J., concurring) ("The mandate in Art. I, § 9, that 'The Privilege of the Writ . . . shall not be suspended' must mean that its issuance, in a proper case or controversy, is an implied power of any federal judge."); Katzenbach v. Morgan, 384 U.S. 641, 647 (1966); Fay v. New York, 332 U.S. 261, 283-84, 293 (1947). *See also* Fay v. Noia, 372 U.S. 391, 399-400 (1963); Smith v. Bennett, 365 U.S. 708, 713 (1961).

9. *E.g.*, Parker v. Levy, 417 U.S. 733 (1974); Gosa v. Mayden, 413 U.S. 665 (1973); Gusik v. Schilder, 340 U.S. 128 (1950).

10. 43 U.S.L.W. 4432 (U.S. March 25, 1975).

11. The Supreme Court granted certiorari in United States v. Augenblick, 377 F.2d 589 (Ct. Cl. 1967), *revd.*, 393 U.S. 348 (1969), together with another case raising similar issues, United States v. Juhl, 383 F.2d 1009 (Ct. Cl. 1967), *revd. sub nom.* United States

Army Captain Councilman, charged with the wrongful sale, transfer, and possession of marijuana, obtained in federal district court a permanent injunction halting his impending court-martial on the ground that his alleged offense was not "service-connected" and thus not within the court-martial's subject-matter jurisdiction.[12] Presumably concluding from past decisions of the United States Court of Military Appeals (USCMA) that Councilman's jurisdictional challenge would be decided against him in the military courts, the district court did not require the exhaustion of intra-service remedies.[13] The Supreme Court reversed, holding "that when a

v. Augenblick, 393 U.S. 348 (1969), "because of the importance of the question concerning the jurisdiction of the Court of Claims to review judgments of courts-martial." 393 U.S. at 349. The Court avoided the issue, however, deciding on the merits against the servicemen after assuming, "arguendo, that a collateral attack on a court-martial judgment may be made in the Court of Claims through a back pay suit." 393 U.S. at 351-52. In Secretary of the Navy v. Avrech, 418 U.S. 676 (1974), the convicted serviceman sought an order declaring his conviction invalid and requiring the Secretary of the Navy to expunge any record of his conviction and to restore to him all pay and benefits lost because of the conviction. Troubled by the uncertainty of the jurisdiction of the district court, the Court asked for supplemental briefs on the issue. After reviewing the briefs—but without the benefit of oral argument—the Court decided on the merits against the serviceman in a per curiam decision, again "[a]ssuming, arguendo, that the District Court had jurisdiction under the circumstances of this case to review the decision of the court-martial." 418 U.S. at 677. In support of its decision to "leave to a future case the resolution of the jurisdictional issue," 418 U.S. at 678, the Court cited *Augenblick*, indicating that it remained undecided on the jurisdiction of the Court of Claims. The per curiam opinion of the Court, the concurring opinion of Justice Stewart, and the dissenting opinion of Justice Marshall all indicated that the Court should defer judgment on the "substantial jurisdictional issues presented." 418 U.S. at 681 (Marshall, J., dissenting).

12. An offense must be "service-connected" to be within the constitutionally limited jurisdiction of courts-martial. O'Callahan v. Parker, 395 U.S. 258, 272 (1969). *See* Relford v. Commandant, 401 U.S. 355, 356 (1971).

13. The district and circuit court opinions did not refer to the exhaustion issue, even though exhaustion is clearly necessary prior to seeking collateral review of court-martial judgments. Gusik v. Schilder, 340 U.S. 128, 131-32 (1950). *See* Noyd v. Bond, 395 U.S. 683, 694-96 (1969). Presumably the courts agreed with decisions based on virtually identical facts holding that exhaustion is unnecessary when there is little chance that the servicemember's jurisdictional challenge will succeed in the military courts. *E.g.*, Chastain v. Slay, 365 F. Supp. 522 (D. Colo. 1973) (citing the district court's opinion in *Councilman* as dispositive); Holder v. Richardson, 364 F. Supp. 1207 (D.D.C. 1973); Redmond v. Warner, 355 F. Supp. 812 (D. Hawaii 1973). *Accord*, Schlesinger v. Councilman, 43 U.S.L.W. 4432, 4440-41 (U.S. March 25, 1975) (Brennan, J., joined by Douglas & Marshall, JJ., concurring and dissenting). *Cf.* DeChamplain v. McLucas, 367 F. Supp. 1291, 1294 (D.D.C. 1973), *vacated*, 43 U.S.L.W. 4453 (U.S. April 15, 1975); Wishmeyer v. Bolton, 361 F. Supp. 629 (N.D. Fla. 1973), *vacated mem.*, 498 F.2d 911 (5th Cir. 1974). By the time the Supreme Court decided *Councilman*, however, the weight of lower court authority was that exhaustion is necessary even if apparently futile, in light of the need to respect the orderly processes of the military court system, the desire to avoid needless friction, and the appropriateness of having facts developed and law interpreted "by the expert adjudicatory tribunals charged in the first instance with responsibility for offenses of members of the armed services." Scott v. Schlesinger, 498 F.2d 1093, 1097 (5th Cir. 1974). *Accord*, Smith v. Secretary of the Navy, 506 F.2d 1250 (8th Cir. 1974); Dooley v. Ploger, 491 F.2d 608 (4th Cir. 1974); Sedivy v. Richardson, 485 F.2d 1115 (3d Cir. 1973); Locks v. Laird, 441 F.2d 479 (9th Cir.), *cert. denied*,

serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise."[14]

While *Councilman* involved an attack on a pending court-martial proceeding rather than an action for post-conviction review, much of the Court's discussion of the relations between military and federal courts applies in the post-conviction context as well. Moreover, the Court construed the Uniform Code of Military Justice (UCMJ) provision that makes "final" all court-martial judgments[15] as not precluding federal court jurisdiction in suits for nonhabeas post-conviction review—thereby eliminating one longstanding obstacle to such review—and implied that in certain circumstances nonhabeas review would be appropriate.[16] Nevertheless, considerable uncertainty still surrounds the availability and scope of nonhabeas review, stemming principally from the lack of a specific statutory basis for such review[17] and the traditional policy, strongly reaffirmed in *Councilman*,[18] of nonintervention by civilian courts in military justice proceedings.[19]

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404 U.S. 986 (1971); Craycroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969), *vacated*, 397 U.S. 335 (1970).

14. 43 U.S.L.W. at 4438-39. *Accord*, McLucas v. DeChamplain, 43 U.S.L.W. 4453, 4457 (U.S. April 15, 1975).

15. UCMJ art. 76, 10 U.S.C. § 876 (1970). *See* note 54 *infra*.

16. 43 U.S.L.W. at 4434-37. The Court's discussion of article 76 can perhaps be viewed as dictum since the Court could have reversed on the exhaustion issue without determining whether article 76 precluded all nonhabeas relief. Because the Court had refused to construe article 76 in several earlier cases, however, *see* note 11 *supra*, it may have been interested in finally resolving the issue.

17. The statutes providing jurisdiction for nonhabeas review do not mention courts-martial. The jurisdiction of the Court of Claims to entertain back-pay suits is based on 28 U.S.C. § 1491 (Supp. II, 1972), granting that court general jurisdiction to render judgment upon any claim against the United States and, since 1972, the power, incidental to granting a money judgment, to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." Mandamus jurisdiction derives from 28 U.S.C. § 1361 (1970), granting district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Declaratory relief is granted pursuant to 28 U.S.C. § 2201 (1970) and FED. R. CIV. P. 57, but must be supported by an independent jurisdictional basis. *See* text at notes 163-70 *infra*.

18. 43 U.S.L.W. at 4435, 4437-39.

19. *See* Hiatt v. Brown, 339 U.S. 103 (1950); *In re* Vidal, 179 U.S. 126 (1900); *In re* Grimley, 137 U.S. 147 (1890). Substantive military law developed separately from civilian law, Noyd v. Bond, 395 U.S. 683, 694 (1969), with the Supreme Court playing no role in its development and exercising little supervisory power over the congressionally established courts enforcing it. Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857). *See* Parker v. Levy, 417 U.S. 733, 743 (1974): "This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own

This Note examines the availability of nonhabeas federal court review for those convicted by courts-martial. Part I discusses the function of such review and suggests a scope of review that would serve that function without unduly burdening the federal courts; Part II sketches the evolution of nonhabeas review and analyzes the jurisdictional problems surrounding its present status; Part III recommends statutory and judicial changes to make the review of courts-martial more equitable and efficient.

I. The Scope of Federal Court Review

Commentators have debated the need for federal court review of court-martial proceedings,[20] disagreeing on the merits of opposing policy considerations and, in particular, on the relative effectiveness of military and civilian courts in protecting individual rights.[21] On

during its long history." A separate court-martial system existed prior to the adoption of the Constitution and was continued in existence by the first Congress in 1789. Act of Sept. 29, 1789, ch. 25, 1 Stat. 95 (providing that the Army should continue to be governed by the existing articles of war). *See* W. Winthrop, *supra* note 1, at 47-48. "It is substantially correct to state that in all countries of which we have knowledge—ancient and modern—the existence of a standing army has been accompanied by the provision for the government of that army under a separate code of military law, administered through special courts." C. Brand, Roman Military Law x (1968). As a result of this separate development, only in the past two decades has it seemed legitimate to compare military with civilian justice. *Compare* United States v. Clay, 1 U.S.C.M.A. 74, 77 1 C.M.R. 74, 77 (1951) (due process rights of servicemembers based not on the Constitution, but on laws enacted by Congress), *and* Burns v. Wilson, 346 U.S. 137, 147 (1953) (Minton, J., concurring) (due process of law for military personnel is what Congress has provided for them), *with* United States v. Tempia, 16 U.S.C.M.A. 629, 634, 37 C.M.R. 249, 254 (1967) (safeguards of the Constitution apply to military trials except in so far as they are made inapplicable either expressly or by necessary implication), *and* Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970) (military rulings on constitutional issues must conform to Supreme Court standards unless it is shown that conditions peculiar to military life require a different rule).

20. *See, e.g.*, Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 Colum. L. Rev. 40 (1961); Burris & Jones, *Civilian Courts and Courts-Martial—The Civilian Attorney's Perspective*, 10 Am. Crim. L. Rev. 139 (1971); Ellis, *Court of Claims Jurisdiction To Review Court-Martial Convictions*, 24 JAG J. 47 (1969); Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 Ohio St. L.J. 193 (1966); McCormack, *Federal Court Intervention in Military Courts —Interrelationship of Defenses and Comity*, 6 Ga. L. Rev. 532 (1972); Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 Va. L. Rev. 483 (1969); Weckstein, *supra* note 3; Comment, *Federal Court Review of Decisions of Military Tribunals*, 40 U. Cin. L. Rev. 569 (1971).

The desired scope of federal court review of state criminal proceedings has also been debated. *See, e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963); Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. Rev. 945 (1964); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315 (1961).

21. *Compare* Sherman, *The Civilianization of Military Law*, 22 Maine L. Rev. 3 (1970), *with* Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 Maine L. Rev. 105 (1970), for evaluations by two of the most capable scholars of military jurisprudence of the relative effectiveness of military and civil courts in protecting individual constitutional rights. *See also* J. Bishop, Justice

one side it is argued that there is little need for federal court review, because Congress and the President—to whom the Constitution has committed the government of the armed forces[22]—have provided a code of military justice[23] and a procedural manual[24] that balance the rights of the individual against the requirements of national defense and that generally have been administered so as to safeguard the rights of the accused. In addition, this argument continues, a need exists for military autonomy in decisions involving uniquely military considerations. Civilian judges are unfamiliar with the distinctive purposes and problems of military law, and thus are unable to appreciate the requirements of morale and discipline that the military justice system must take into account.

UNDER FIRE (1974), *reviewed*, Sherman, 84 YALE L.J. 373 (1974); Kent, *Practical Benefits for the Accused—A Case Comparison of the United States Civilian and Military Systems of Justice*, 9 DUQUESNE L. REV. 186 (1970); Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482 (1971); Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 UCLA L. REV. 1240 (1968), *reprinted in* 46 MIL. L. REV. 77 (1969); Schiesser & Benson, *Modern Military Justice*, 19 CATHOLIC U. L. REV. 489 (1970); Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 IND. L.J. 539 (1974); Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962).

22. "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces . . . ." U.S. CONST. art. I, § 8, cl. 14. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." U.S. CONST. art. II, § 2, cl. 1. Investing express control of courts-martial in Congress rather than the President was a conscious decision of the framers of the Constitution—a response to the problems of Parliament in seventeenth-century England in restraining the King's asserted independent prerogative to try soldiers by court-martial in time of peace. Article 9, § 4, of the Articles of Confederation—from which the present clause was taken—was even more explicit: "The United States, in Congress assembled, shall . . . have the sole and exclusive right and power of . . . making rules for the government and regulation of the . . . land and naval forces, and directing their operations." *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 330 (1911); THE FEDERALIST No. 23 (A. Hamilton); J. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 62, 225 (student ed. 1971). Congress also has other broad military powers: "To raise and support Armies," U.S. CONST. art. I, § 8, cl. 12; "To provide and maintain a Navy," cl. 13; "To provide for calling forth the Militia to execute the Laws of the Union," cl. 15; "To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States," cl. 16.

23. The present system of military justice is set forth in the 140 articles of the Uniform Code of Military Justice (UCMJ), enacted on May 5, 1950, and codified as 10 U.S.C. §§ 801-940 (1970).

24. Pursuant to authority delegated by article 36 of the UCMJ, 10 U.S.C. § 836 (1970), the President has promulgated the *Manual for Courts-Martial* (MCM), the most recent version of which was prescribed in 1969 by Exec. Order No. 11476, 3 C.F.R. 132 (Comp. 1969). As an executive order the *Manual* has the force of law, although provisions inconsistent with the UCMJ are unauthorized and thus invalid. The MCM implements the UCMJ, prescribing military justice procedures, rules of evidence, and maximum punishments. The Service Secretaries have limited authority to issue regulations to carry out their responsibilities of ensuring the preparedness and effectiveness of the armed forces. *See, e.g.*, 10 U.S.C. § 3012 (1970) (Army). These regulations also have the force and effect of law. *Cf.* United States v. Eliason, 41 U.S. 291 (1842).

On the other side it is argued that the military justice system remains an imperfect guarantor of servicemembers' rights, subject in particular to excessive influence by military commanders. Recent improvements in military justice have not reduced constitutional misinterpretations to the point where federal court review is superfluous, but instead have served principally to reduce the disruptive effect of such review. The best guarantee of fundamental fairness in military proceedings is the existence of a supervisory authority wholly independent of the military. Because of their special competence, federal courts should retain the ultimate authority to decide questions of constitutional law. With the enormous growth of the military in this century, the expanded number of "civilian soldiers," and the intermingling of civilian and military societies[25]—witness the scattering of military bases throughout the country and the expanded resort to off-base housing[26]—it is no longer true that the armed forces constitute an isolated community requiring an autonomous system of justice. Civilian courts can adequately consider the special needs of the military when interpreting the UCMJ, which is no more complex or specialized than other statutory schemes administered by federal courts.

Recent Supreme Court decisions do not resolve this debate; they contain little discussion of the reasons for and proper scope of federal court review of military proceedings.[27] In *Burns v. Wilson*,[28]

25. *See* Warren, *supra* note 21, at 188: "When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question."

26. *See* Sherman, 49 IND. L.J. 539, *supra* note 21, at 572.

27. Prior to World War II it was clear that federal court review was to be limited narrowly. Federal courts were willing to examine only (1) whether the court-martial had jurisdiction over the servicemember, *see, e.g.*, Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806), and the offense, *see, e.g.*, Collins v. McDonald, 258 U.S. 416 (1922); (2) whether the sentence was within authorized limits, *see, e.g.*, Carter v. McClaughry, 183 U.S. 365 (1902), and properly approved, *see, e.g.*, United States v. Fletcher, 148 U.S. 84 (1893); United States v. Page, 137 U.S. 673 (1891); Runkle v. United States, 122 U.S. 543 (1887); and (3) whether the court-martial was convened, constituted, and conducted according to applicable statutes and regulations. *See, e.g.*, United States v. Brown, 206 U.S. 240 (1907); McClaughry v. Deming, 186 U.S. 49 (1902); Swaim v. United States, 165 U.S. 553 (1897); Johnson v. Sayre, 158 U.S. 109 (1895); Mullan v. United States, 140 U.S. 240 (1891).

Federal courts uniformly refused to question the mode of conducting the trial, the admissibility of evidence, and matters left to the discretion of the military court or judge. *See, e.g., In re* Yamashita, 327 U.S. 1, 23 (1946); Mullan v. United States, 212 U.S. 516 (1909); Swaim v. United States, 165 U.S. 553, 561 (1897); Keyes v. United States, 109 U.S. 336 (1883). In *Swaim*, for instance, the Court refused to consider the qualifications of the judge advocate advising the court, questions of evidence admissibility, whether the evidence was insufficient as a matter of law, and whether the court-martial abused its discretion in overruling a challenge of the qualifications of a court member.

Alleged constitutional errors in court-martial proceedings were not reviewed by federal courts prior to World War II, although the few cases reaching the Supreme Court in which such errors were raised are not sufficiently clear or numerous to deter-

the Court indicated that the function of federal court review, at least in habeas corpus actions, is to determine only whether courts-martial act within their personal and subject matter jurisdiction and give "fair consideration" to all allegations of constitutional error,[29] rather than to ensure error-free court-martial proceedings. Subsequently, in *United States v. Augenblick*,[30] a back-pay suit brought in the Court of Claims, the Supreme Court suggested that federal court review might extend to all constitutional error, whether or not the military courts considered it, but cautioned that "apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest."[31]

In *Parker v. Levy*,[32] a 1974 decision, the Court cited *Burns* as the prevailing standard without discussing the impact of *Augenblick*.[33] Moreover, the opinion in *Councilman* suggests that the range of issues cognizable in collateral actions is perhaps even more restricted than under the *Burns* test. At one point the Court stated that court-martial judgments can be attacked only for "lack of jurisdiction or some other equally fundamental defect."[34] At another point, the Court declared that "the question whether a court-martial judgment properly may be deemed void—*i.e.*, without res judicata effect for purposes of the matter at hand—may turn on the nature of the alleged defect, and the gravity of the harm from which relief is sought," and that "both factors must be assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress."[35] Signifi-

mine whether the Court was disinterested because of the assumed inapplicability of the Bill of Rights to the military or because of limitations on the scope of review. *See* Carter v. McClaughry, 183 U.S. 365 (1902); Johnson v. Sayre, 158 U.S. 109, 116 (1895); Smith v. Whitney, 116 U.S. 167 (1886). The expansion of the scope of review in civilian habeas corpus cases to include review of constitutional errors, *see, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938), led six circuits in the 1940's to conclude that military habeas corpus should be similarly expanded. *See* Montalvo v. Hiatt, 174 F.2d 645 (5th Cir.), *cert. denied*, 338 U.S. 874 (1949); Smith v. Hiatt, 170 F.2d 61 (3d Cir. 1948), *revd. sub nom.* Humphrey v. Smith, 336 U.S. 695 (1949); Benjamin v. Hunter, 169 F.2d 512 (10th Cir. 1948); Wrublewski v. McInerney, 166 F.2d 243 (9th Cir. 1948); United States *ex rel.* Weintraub v. Swenson, 165 F.2d 756 (2d Cir. 1948); United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); Schita v. King, 133 F.2d 283 (8th Cir. 1943).

28. 346 U.S. 137 (1953) (plurality opinion).
29. 346 U.S. at 144.
30. 393 U.S. 348 (1969).
31. 393 U.S. at 356.
32. 417 U.S. 733 (1974).
33. 417 U.S. at 762.
34. 43 U.S.L.W. at 4435.
35. 43 U.S.L.W. at 4437.

cantly, in commenting on the scope of review, the Court turned not to *Burns*, which the lower courts had for two decades viewed as the leading precedent,[36] but to three earlier decisions that had restricted federal court scrutiny to the sole issue of the court-martial's personal and subject-matter jurisdiction.[37]

The proper scope of federal court review of courts-martial thus has not been consistently or clearly articulated by the Supreme Court. The Court recognized in *Councilman* that Congress has some leeway in establishing the scope of federal court review of courts-martial,[38] however, and it is therefore appropriate to consider the substance and legislative history of relevant provisions of the UCMJ.

During the drafting of the UCMJ there was significant discussion about the role of civilian judges in the administration of military justice.[39] Direct federal court review of court-martial convictions on questions of law was proposed as a means of assuring fairness in court-martial proceedings.[40] The principal objection to this proposal was that federal courts might improperly weigh the requirements of military discipline and morale in construing substantive and procedural military law.[41] Due process for military personnel differs from that accorded civilians,[42] and while Congress was unwilling

36. *See generally* H. MOYER, JUSTICE AND THE MILITARY §§ 6-320 to -344 (1972) (includes a circuit-by-circuit analysis of the lower court interpretations of *Burns*). *See also* text at note 59 *infra*.

37. 43 U.S.L.W. at 4435. The Court cited Hiatt v. Brown, 339 U.S. 103, 111 (1950), which quoted *In re* Grimley, 137 U.S. 147, 150 (1890) ("The single inquiry, the test, is jurisdiction."). Also cited was Smith v. Whitney, 116 U.S. 167, 177 (1886) ("[T]he general rule [is] that the acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civilian courts.") In *Councilman* the Court stated that it had "adhered uniformly" to this general rule. 43 U.S.L.W. at 4435.

38. 43 U.S.L.W. at 4437.

39. *See* Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 51-71 (1972).

40. *See* 96 CONG. REC. 1302, 1304 (1950) (remarks of Senator Tobey); *Hearings on H.R. 2775 Before a Subcomm. of the House Comm. on Armed Services*, 80th Cong., 1st Sess. 2084 (1947); *Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 157, 161, 238 (1949) [hereinafter *Senate Hearings*]. *See generally* W. GENEROUS, SWORDS AND SCALES 34-53 (1973).

41. *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 778-81, 794-96 (1949) (testimony of Frederick Wiener) [hereinafter *House Hearings*]; *Senate Hearings, supra* note 40, at 259-60 (testimony of Major General Green, Judge Advocate General of the Army). The House Subcommittee was warned that the proposed civilian appellate court would cause delay in the administration of military justice, thereby endangering the security of the nation, *House Hearings, supra*, at 772-73, and that civilian review of courts-martial would interfere with the performance of the military. *Id.* at 778-806.

42. Burns v. Wilson, 346 U.S. 137, 147 (1953) (Minton, J., concurring); Reaves v. Ainsworth, 219 U.S. 296, 304 (1911); United States v. Clay, 1 U.S.C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951). For an examination of the historical relationship between military personnel and the Constitution, see Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) (the Bill of Rights applies except for grand jury and petty jury rights). Henderson's thesis was successfully disproved

to let military judges alone decide where the differences should lie, it was equally unwilling to give federal judges, with widely varying knowledge of military affairs, an unfettered hand in that determination.[43] The compromise was to establish a Court of Military Appeals composed of three presidentially appointed[44] civilians, "completely removed from all military influence or persuasion."[45] According to the House Committee Report, this court was designed to be "the court of last resort for court-martial cases, except for the constitutional right of habeas corpus."[46] Intermediate appellate courts—now known as the Courts of Military Review—also were established, with both military and civilian members.[47] The military appellate system was to supervise the administration of military justice[48] and "insure public confidence in the fairness of military justice."[49]

From this legislative history it is clear that Congress intended that the primary civilian influence on military justice be provided by the United States Court of Military Appeals (USCMA) and the several Courts of Military Review. These courts were to interpret the UCMJ and determine where the line should be drawn between individual rights and military needs—a role they have pursued

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by massive documentation and persuasive argument in Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958), and Weiner, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 166 (1958) (the Bill of Rights was not intended to apply and did not apply in courts-martial). It remains true today that the Bill of Rights does not protect servicemembers to the same extent that it protects civilians. *See* Parker v. Levy, 417 U.S. 733 (1974), *criticized in* Sherman, 49 IND. L. REV. 539, *supra* note 21, at 569-73 (1974). The Court stated in *Parker* that "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." 417 U.S. at 758 (referring to first amendment protections). *See* Note, *A Sixth Amendment Right to Counsel Under Article 15 of the Uniform Code of Military Justice*, 72 MICH. L. REV. 1431, 1437-43 (1974).

43. Willis, *supra* note 39, at 65-70. *See* Burns v. Wilson, 346 U.S. 137, 140 (1953) ("the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment").

44. UCMJ art. 67, 10 U.S.C. § 867 (1970).

45. H.R. REP. No. 491, 81st Cong., 1st Sess. 7 (1949).

46. H.R. REP. No. 491, *supra* note 45, at 7. *See also* 95 CONG. REC. 5721 (1949) (remarks of Representative Brooks). One of the principal drafters of the UCMJ, discussing the Court of Military Appeals, explained in committee hearings that "there is still a way to go to the Supreme Court of the United States, actually, and that is by habeas corpus." *House Hearings*, *supra* note 41, at 1277-78.

47. UCMJ art. 66, 10 U.S.C. § 866 (1970).

48. Noyd v. Bond, 395 U.S. 683, 694 (1969) ("When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.").

49. 96 CONG. REC. 1363 (1950) (remarks of Senator Kefauver).

actively,[50] although not without criticism.[51] Federal court review extending to all questions of law, or perhaps even solely to constitutional issues, would conflict with this congressional policy decision, since such review would necessarily entail independent judgments on the proper balance between individual rights and military needs. A more restricted federal court review, however, arguably is not inconsistent with this policy. Review to determine whether a court-martial had jurisdiction over the servicemember and the offense would involve little of the balancing function that Congress vested in the military appellate courts. The same may be said of review for clear violations of constitutional provisions that apply to the military under decisions of the Supreme Court or the USCMA, at least where the military tribunals manifestly have failed to consider the alleged errors.

It is true that when Congress creates a right and provides a remedy, the remedy normally will be viewed as exclusive,[52] suggesting that violations of the court-martial defendant's statutory rights should be rectifiable only by the intra-service review authorities established to protect those rights. But, since constitutional rights and limitations on the personal and subject matter jurisdiction of courts-martial[53] are not congressionally created, this principle would not preclude challenges based on such grounds.

Also significant in determining the proper relationship between military and federal courts is article 76 of the UCMJ: "[T]he proceedings, findings, and sentences of courts-martial . . . and all dismissals and discharges carried into execution under sentences by courts-martial . . . are final and conclusive . . . [and] binding upon all

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50. *See* Sherman, *Justice in the Military*, in CONSCIENCE AND COMMAND 21, 28 (J. Finn ed. 1971); Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27 (1972). Justice Douglas has noted that the USCMA "has at least been partially successful in infusing civilian notions of due process into the military justice system." Parisi v. Davidson, 405 U.S. 34, 52 n.4 (1972) (concurring opinion) (citing cases).

51. *E.g.*, Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325, 373 (1971). *Cf.* R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1970).

52. Union Pac. R.R. v. Price, 360 U.S. 601, 608 (1959); Switchmen's Union of N. Am. v. National Mediation Bd., 320 U.S. 297, 301 (1943); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 404 (1940); United States v. Babcock, 250 U.S. 328, 331 (1919). According to Justice Douglas, at least, this is true only when the body providing the remedy is neutral on the issue. National R.R. Passenger Corp. v. National Assn. of R.R. Passengers, 414 U.S. 453, 470 (1974) (Douglas, J., dissenting) (by implication). On the other hand, where a statutory right is created without a specified remedy, there is a strong inference that judicial action is not precluded. Switchmen's Union of N. Am. v. National Mediation Bd., 320 U.S. 297, 300 (1943) (dictum). *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969) ("The existence of a statutory right implies the existence of all necessary and appropriate remedies."); Harmon v. Brucker, 355 U.S. 579, 581-82 (1958).

53. *See* note 83 *infra*.

departments, courts, agencies, and officers of the United States."[54] While *Councilman* decided that article 76 does not entirely preclude nonhabeas review,[55] the Court stated that the provision "is highly relevant to the proper scope of collateral attack on court-martial convictions and to the propriety of equitable intervention into pending court-martial proceedings."[56] Absent a more explicit interpretation by the Court, however, it is difficult to conclude from article 76 anything beyond the fact that Congress did not desire significant federal court intervention into military justice proceedings.

What, then, is the proper role of federal courts in the administration of military justice? Clearly, Congress and the Supreme Court have rejected the position that the purpose of federal court review is to ensure error-free court-martial proceedings.[57] Furthermore, if even a small percentage of the servicemembers convicted by courts-martial could obtain federal court review of all errors of law, federal courts would be significantly burdened.[58] A more plausible position is that review should be available for all constitutional issues, a position several courts have adopted by construing the *Burns* "fair consideration" language to mean that courts-martial must correctly resolve constitutional issues before federal court review is precluded.[59] *Councilman* does not clearly rule out this stance, for

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54. Article 76 reads in full:

> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title [article 73] and to action by the Secretary concerned as provided in section 874 of this title [article 74], and the authority of the President.

10 U.S.C. § 876 (1970).

55. 43 U.S.L.W. at 4436-37.

56. 43 U.S.L.W. at 4434.

57. *See* text at notes 28-37, 39-51 *supra*.

58. In fiscal year 1972 the Army alone, with an average personnel strength of under 1 million, tried 31,587 persons by courts-martial. ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS 16 (1972) (Report of the Judge Advocate General of the Army) [hereinafter ANNUAL REPORT]. During the same period the Navy conducted 21,977 courts-martial, *id.* at 30 (Report of the Judge Advocate General of the Navy), and the Air Force 2,661. *Id.* at 32 (Report of the Judge Advocate General of the Air Force). One reason for the large number of trials is that the UCMJ regulates aspects of the conduct of servicemembers that in the civilian sphere are left unregulated, and imposes sentences that include forms of administrative discipline below the threshold of civilian criminal sanctions. Parker v. Levy, 417 U.S. 733, 749-50 (1974).

59. *See, e.g.*, Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971); Gallagher v. United States, 423 F.2d 1371 (Ct. Cl.), *cert. denied*, 400 U.S. 849 (1970); Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970). *Cf.* Levy v. Parker, 478 F.2d 772 (3d Cir. 1973), *revd. on other grounds*, 417 U.S. 733 (1974). *But see* Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972), *cert. denied*, 410 U.S. 942 (1973); Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967) (relief unavailable if

arguably constitutional error is a defect as "fundamental" as lack of jurisdiction.[60] With review of this scope, federal courts would retain the ultimate authority to deal with "the nice subtleties of constitutional law" that arise in courts-martial.[61]

Several factors undercut the attractiveness of this position. First, the decision of many constitutional questions faced by courts-martial requires a delicate balancing of individual rights against military needs—a balancing task for which Congress created the specialized military appellate courts.[62] If federal courts were to defer to USCMA precedent on constitutional issues whose resolution requires special knowledge of the military environment, review of all constitutional error might be feasible without undue federal court intervention. Expecting federal courts to defer to military courts on constitutional issues, however, is unrealistic in light of past practices.[63] In addition, a scope of review differentiating between issues that require military expertise and those that do not would be difficult to devise and even more difficult to apply. Second, even with review limited to constitutional error, federal courts might be heavily burdened by relief petitions, particularly in districts with major military installations. The large number of habeas petitions from those convicted in state courts[64] suggests that allegations of constitutional error are easily made. Third, it is often difficult to determine whether facts stated in a complaint amount to constitutional error when a servicemember alleges that the cumulative effect of numerous errors of law is a denial of due process. In sum, the burden on federal courts, as well as the extent of their intrusion into military affairs, might not be significantly less if they reviewed all constitutional issues than if they reviewed all questions of law.

As an alternative, federal court review could be limited to a

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military courts gave constitutional issues full and fair consideration, even though their conclusions were erroneous). A circuit-by-circuit analysis of the scope of federal court review is presented in H. MOYER, *supra* note 36, §§ 6-320 to -344.

60. *See* text at note 34 *supra*.

61. The opinion of Justice Brennan in *Councilman* stated: "It is virtually hornbook law that 'courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law.'" 43 U.S.L.W. at 4440-41 (Brennan, Douglas & Marshall, JJ., concurring and dissenting), *quoting* O'Callahan v. Parker, 395 U.S. 258, 265 (1969). The majority, however, thought otherwise: "[I]t must be assumed that the military court system will vindicate servicemen's constitutional rights." 43 U.S.L.W. at 4438.

62. *See* text at notes 44-51 *supra*.

63. *Cf.* Levy v. Parker, 478 F.2d 772, 795 (3d Cir. 1973), *revd.*, 417 U.S. 773 (1974); Cole v. Laird, 468 F.2d 829, 832 n.4 (5th Cir. 1972); McCahill v. Eason, 361 F. Supp. 588, 589 (N.D. Fla. 1973); Redmond v. Warner, 355 F. Supp. 812 (D. Hawaii 1973).

64. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 261 n.14 (1973) (Powell, J., joined by Burger, C.J. & Rehnquist, J., concurring); Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973); Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?*, 21 DE PAUL L. REV. 740 (1972). *But cf. Developments*, *supra* note 8, at 1041-42.

determination whether the court-martial had jurisdiction over the person and the offense. Since few servicemembers could make even a colorable claim that courts-martial had erred in this regard, the burden on federal courts would be slight. This would, however, leave courts-martial entirely free from federal court scrutiny in the vast majority of cases. While the prospect of subsequent review probably does not prevent military judges from deciding constitutional questions incorrectly, it surely reduces the number of instances where such questions are not even given fair consideration. Moreover, limiting review to jurisdictional issues would exempt all substantive and procedural military law from constitutional challenge in federal courts.

It is possible to formulate an intermediate scope of review that encourages courts-martial to provide fair procedures without usurping their responsibility to decide federal claims arising in the military setting. Federal court review, under this standard, should be available only where (1) the jurisdiction of the court-martial system over the servicemember or the offense is challenged;[65] (2) military substantive or procedural statutes or regulations are constitutionally challenged; or (3) either the military has failed to give alleged constitutional errors consideration that is reasonable[66] in light of the gravity of the sentence and of the alleged error, or constitutional error is claimed on the basis of facts outside the record that were unavailable for consideration on direct appeal.

Keeping courts-martial within their constitutionally limited jurisdiction is the most important and least intrusive function federal courts can perform. In addition, review of the UCMJ and the *Manual for Courts-Martial* for constitutionality retains the function of article III courts as the final arbiters of federal legislation without intruding into court-martial decisions of law or fact. The third prong of the proposed review standard is similar to the *Burns* "fair consideration" test.[67] Like *Councilman*, however, it recognizes that

65. The personal and subject-matter jurisdiction of the court-martial system is constitutionally limited. *See* note 83 *infra*. The three types of courts-martial—summary, special, and general—also have statutory jurisdictional limits on the offenses they may consider and the severity of the sentences they may impose. *See* UCMJ arts. 16-20, 10 U.S.C. §§ 816-20 (1970). The proposed standard limits federal court review to constitutional violations.

66. Federal courts should have the power to overturn military court decisions based on manifestly incorrect interpretations of the Constitution. If such power were expressly conferred in the review standard, however, federal courts could too easily expand the standard to all constitutional error by loosely construing the phrase "manifestly incorrect." The standard therefore has been drafted more narrowly than it is intended to operate in practice. In the rare instance in which the military court's resolution of a constitutional issue is indeed manifestly incorrect, the federal court will be able to reverse by finding, somewhat disingenuously, that the military court's "consideration" was not "reasonable."

67. *See* text at note 29 *supra*. While the burden on federal courts under the proposed standard will be less than it would be if all allegations of constitutional error

the scope of review should vary with the gravity of the alleged error and of the court-martial sentence.[68] Thus, close military court scrutiny of alleged serious constitutional error should be required before federal courts uphold the imposition of severe sanctions. "Reasonable" consideration rather than "fair" consideration is required in the proposed standard to make clear that federal courts should intervene *only* when military courts pay inadequate attention to constitutional issues, and not when their deliberations simply result in incorrect decisions.[69] The trial record or appellate court

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were reviewed, the occasions for federal court review still will be numerous. Relatively few court-martial convictions are reviewed by the competent military appellate courts. During fiscal year 1972 there were 56,873 court-martial cases in all branches of the armed forces. During that period the Courts of Military Review considered 6,203 cases (10.9% of that total) and the USCMA rendered opinions in 129 cases (.23% of that total). ANNUAL REPORT, *supra* note 58, at 4, 8-11. Convictions of general or flag officers; convictions that result in sentences of at least one year of confinement, death, or punitive discharge; and convictions of commissioned officers, cadets, or midshipmen that result in discharge receive automatic appellate consideration by the several courts of military review. The USCMA must hear all cases in which the sentence affects a general or flag officer or extends to death, plus all cases reviewed by a Court of Military Review that the Judge Advocate General orders sent to the USCMA for review. It has discretion to hear all other cases reviewed by the Courts of Military Review. UCMJ arts. 66-67, 10 U.S.C. §§ 866-67 (1970). Sentences that do not warrant review by the Courts of Military Review are reviewed administratively on a nonadversarial basis by members of the Office of the Judge Advocate General, usually with no possible route to the appellate courts. *See* UCMJ arts. 60-65, 69, 10 U.S.C. §§ 860-65, 869 (1970); MCM, *supra* note 24, ¶¶ 84-91, 103. While the exact procedure in cases not reviewed by a Court of Military Review depends on the type of court-martial and the severity of the sentence, at most the UCMJ requires review by the authority convening the court-martial (or his successor in office) based on the written opinion of his staff judge advocate or legal officer, and by the Office of the Judge Advocate General. For a summary, see United States v. Snyder, 18 U.S.C.M.A. 480, 481-82, 40 C.M.R. 192, 193-94 (1969).

Although federal courts perhaps may safely defer to the judgment of the USCMA on constitutional issues, cases not reviewed by that tribunal often are made "final" by article 76 without scrutiny by judges experienced in constitutional law. *Cf.* O'Callahan v. Parker, 395 U.S. 258, 265 (1969): "While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."

Many have viewed federal court review of state court proceedings as unnecessary where the issues have been fully and fairly considered by a state appellate tribunal. *See, e.g.*, Wade v. Wilson, 396 U.S. 282, 289 (1970) (Black, J., dissenting) ("One considered appeal is enough, in the absence of factors which show a possibility that a substantial injustice has been inflicted on the defendant."); Friendly, *supra* note 20, at 165 n.125 ("[I]f I were to rely solely on my limited experience, I would think the case for the final federal say has been considerably exaggerated. . . . My observation of the work of [state courts in New York, Connecticut, and Vermont] . . . does not suggest that federal determination of [constitutional] questions is notably better. . . . In the few [cases] where we disagree, I feel no assurance that the federal determination is superior."). The principles of federalism that underlie this view are inapplicable to the military-federal court relationship. Parisi v. Davidson, 405 U.S. 34, 51 (1972) (Douglas, J., concurring); Noyd v. Bond, 395 U.S. 683, 694 (1969).

68. *See* text at note 35 *supra*.

69. *But see* note 66 *supra*.

decision should in most cases reveal whether the issue was considered adequately, thus facilitating the screening of petitions. This review standard does not eliminate the need to determine whether error is constitutional nor preclude the necessity of federal court balancing of individual rights and military needs. It does, however, reduce the number of instances in which either is necessary.

Despite numerous suits for collateral review of courts-martial, it remains unclear whether the scope of review in nonhabeas actions is the same as that in habeas actions. The Supreme Court's only suggestion on this issue is its ambiguous statement in *Councilman* that the "grounds for impeachment cognizable in habeas proceedings may not be sufficient to warrant other forms of collateral relief."[70] This statement seems reasonable if it means that the scope of federal court review should to some degree turn on the gravity of the court-martial sentence. This policy is not implemented, however, by automatically granting a greater scope of review to those seeking release from custody than to those seeking other relief. While civilian courts rely almost entirely on imprisonment to punish serious offenders, courts-martial frequently impose serious sanctions, such as punitive discharges, forfeitures of pay, fines, and reductions in rank, that do not constitute "custody" for the purpose of obtaining a writ of habeas corpus. Most severe is generally the punitive discharge, concerning which the court in *Kauffman v. Secretary of the Air Force* stated: "[T]he deprivation of liberty under an invalid conviction is a grievous injury, but a military discharge under other than honorable conditions imposes a lifelong disability of greater consequence for persons unlawfully convicted by courts martial."[71] In addition to terminating his career and depriving him of government benefits,[72] a punitive discharge "stigmatizes the serviceman's reputation, impedes his ability to gain employment and is in life, if not in law, prima facie evidence against the serviceman's character, patriotism or loyalty."[73] Thus, whether a servicemember is in custody for habeas corpus purposes is often unrelated to the severity of his sentence

70. 43 U.S.L.W. at 4437.

71. 415 F.2d 991, 995-96 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970).

72. Under 38 U.S.C. § 101(2) (1970) and 38 C.F.R. § 3.12(a) (1974), a discharge under dishonorable conditions bars the receipt of any veterans' benefits. A bad-conduct discharge ordered by a general court-martial also terminates benefits automatically. 38 U.S.C. § 3103 (1970), 38 C.F.R. § 3.12(c)(2) (1974). A bad-conduct discharge awarded by a special court-martial bars receipt of benefits only if awarded for the reasons contained in 38 U.S.C. § 3103 (1970) and 38 C.F.R. §§ 3.12(c), (d) (1974). For the differences between the jurisdiction of general and special courts-martial, see UCMJ arts. 18-19, 10 U.S.C. §§ 818-19 (1970).

73. Stapp v. Resor, 314 F. Supp. 475, 478 (S.D.N.Y. 1970). "In terms of its effects on reputation, the stigma experienced by the recipient of a discharge under other than honorable conditions is very akin to the concept of infamy . . . ." Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L.J. 41, 50.

and to the burden of the continuing disabilities he faces.[74] While making the standard of collateral review depend on whether the defendant seeks a release from custody as opposed to other relief is probably not so arbitrary as to deny equal protection,[75] it is a pro-

74. This point has been relied upon heavily by many of the courts expanding nonhabeas review. *See, e.g.*, Homcy v. Resor, 455 F.2d 1345, 1349 (D.C. Cir. 1971); Kauffman v. Secretary of the Air Force, 415 F.2d 991, 995 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); Brown v. United States, 365 F. Supp. 328, 333-34 (E.D. Pa. 1973), *aff'd.*, 508 F.2d 618 (3d Cir. 1975). *See also* Jones v. United States, 419 U.S. 907 (1974) (Douglas, J., dissenting from denial of certiorari). Often quoted is the rationale of the Court of Claims in Augenblick v. United States, 377 F.2d 586, 592 (1967), *revd. on other grounds*, 393 U.S. 348 (1968):

> There is no adequate reason for looking to habeas corpus alone, or for thinking that Congress limited its exception from "finality" to that specific proceeding. Liberty is of course important, but so are a man's career, his livelihood, his rights as a veteran, his status as a convicted criminal, and his reputation. To deny collateral attack to one not in confinement—the consequence of saying that habeas corpus is the only remedy—would be to deny the possibility of review by a constitutional court, and ultimately by the Supreme Court, of the constitutional claims of servicemen like plaintiff who have not been sentenced to jail or who have been released.

On the effect of discharges other than honorable, see Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1 (1973); Lunding, *Judicial Review of Military Administrative Discharges*, 83 YALE L.J. 33 (1973).

75. The degree of scrutiny to which this classification would be subjected is unclear. If minimal scrutiny is employed, the classification probably would survive because personal physical liberty in general is arguably more important than the monetary loss or public obloquy that results from a conviction. If stricter scrutiny is employed, the classification may not survive if challenged by a servicemember sentenced to a punitive discharge who had no opportunity to request habeas review, for his situation is in no significant respect distinguishable from a servicemember sentenced to a short imprisonment term.

In determining what level of scrutiny is appropriate it is significant that for due process and equal protection purposes the Court has found differences between the trial and appellate stages of a criminal proceeding and between an appeal of right and a discretionary appeal. The scrutiny of classifications apparently becomes less rigorous as the defendant exhausts his review possibilities. *See* Ross v. Moffitt, 417 U.S. 600, 610-12 (1974). Collateral attacks, occurring after the exhaustion of intra-service appeals, are more akin to discretionary appeals than to appeals of right. A classification upon which the scope of collateral review is based accordingly should be subjected to less scrutiny than a similar classification at trial or on direct appeal. *Compare, e.g.*, Douglas v. California, 372 U.S. 353 (1963) (appointment of counsel for indigent state defendant required on first appeal of right), *with* Ross v. Moffitt, 417 U.S. 600 (1974) (counsel for indigent need not be appointed for discretionary appeal to state supreme court and application for certiorari to U.S. Supreme Court). *Cf.* Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966) (statute conditioning mandatory USCMA review of court-martial judgment on whether servicemember is a general or flag officer upheld against equal protection attack). It also should be noted that deference to the military apparently has lessened the Court's equal protection scrutiny of classifications in the military setting. *See* Schlesinger v. Ballard, 43 U.S.L.W. 4158 (U.S. Jan. 15, 1975).

In light of the constitutional protection of the writ of habeas corpus, *see* note 8 *supra*, and the lack of corresponding protection of an avenue of collateral review for those not in custody, a distinction in terms of scope of review between those seeking habeas and nonhabeas relief arguably is constitutionally created. To say that the distinction in this setting violates equal protection, however, is not tantamount to saying that the equal protection clause impliedly repeals the suspension clause. The suspension clause requires that collateral review be available to those in custody. If a class of people is placed in a situation indistinguishable from or more severe than

cedure difficult to justify in view of the relative needs of servicemembers and the function of federal court review.

II. Jurisdictional Bases for Federal Court Review

Despite the arguments against conditioning federal court review on whether a servicemember seeks a release from custody, the availability of nonhabeas post-conviction relief remains uncertain even after *Councilman*. The problem that had most troubled lower federal courts, however—the effect of the article 76 finality provision[76]

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custody in practical effect, the equal protection clause requires that they be treated similarly and accorded review of the same scope and availability. The equal protection issue has apparently been mentioned only in Jones v. United States, 419 U.S. 907, 910 (1974) (Douglas, J., dissenting from denial of certiorari).

To the extent that the scope of collateral review is intended to reflect the seriousness of the penalty imposed, a distinction based on whether a servicemember seeks a release from custody as opposed to nonhabeas relief also may be attacked as a conclusive presumption that sentences involving custody are more serious than other sentences. That presumption is "not necessarily or universally true in fact," and hence arguably violates the due process clause. Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 644 (1974), *quoting* Vlandis v. Kline, 412 U.S. 441, 452 (1973). The scope of the conclusive presumption doctrine is unclear, however, and the doctrine is subject to serious theoretical and practical criticisms. *See* Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 Mich. L. Rev. 800 (1974). Assuming that the doctrine has continued vitality, its most reasonable limitation would be to cases involving "burdens that wor[k] a particular hardship on the individuals involved," *id.* at 830, a limitation that seems clearly to cover the servicemember sentenced to a punitive discharge.

76. *See* note 54 *supra*. The USCMA, established by Congress as the "final interpreter" of the UCMJ, S. Rep. No. 806, 90th Cong., 1st Sess. 2 (1967), generally has viewed article 76 as determining the cutoff point for review within the military, prohibiting the Courts of Military Review and the USCMA from examining alleged errors in cases beyond the explicit statutory scope of their jurisdictions on direct review. *See, e.g.*, Allen v. United States, 21 U.S.C.M.A. 288, 289, 45 C.M.R. 62, 63 (1972); Platt v. United States, 21 U.S.C.M.A 496, 497, 45 C.M.R. 271, 272 (1972). The USCMA has provided little insight into the effect of article 76 on federal court jurisdiction, for it is hard to conceive of a setting in which it would be presented with the issue. Generally, however, the USCMA has viewed federal court review as a fait accompli, an undesirable consequence flowing from the failure of military courts to face "squarely" all of the constitutional issues in the cases before them. United States v. Tempia, 16 U.S.C.M.A. 629, 642-43, 37 C.M.R. 249, 263-64 (1967) (Kilday, J., concurring). Judge Kilday cited four recent nonhabeas collateral attack decisions supporting this proposition: Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965); Shaw v. United States, 357 F.2d 949 (Ct. Cl. 1966); Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

In United States v. Frischholz, 16 U.S.C.M.A. 150, 151, 36 C.M.R. 306, 307 (1966), the court declared that article 76

> does not insulate a conviction from subsequent attack in an appropriate forum. At best it provides finality only as to interpretations of military law by this Court. . . . [Article 76] has never been held to bar review of a court-martial, when fundamental questions of jurisdiction are involved. See, Burns v. Wilson, 346 U.S. 137 [1953]; Shapiro v. United States, 69 F. Supp. 205 [Ct. Cl. 1947]; Application of Stapley, 246 F. Supp. 316 [D. Utah 1965]. As the Supreme Court of the United States observed in a related case, a finality clause of the kind in question describes the normal "terminal point for proceedings within the court-martial system" Gusik v. Schilder, 340 U.S. 128, 132 [1950].

By citing *Shapiro*, a Court of Claims case, the court recognized that a suit for back pay is at least one means of nonhabeas federal court review not precluded by article

—was removed when the Court in *Councilman* concluded that that provision did not entirely foreclose nonhabeas review.[77]

The Court easily could have reached the opposite conclusion by viewing article 76 as an exercise by Congress of its power to insulate courts-martial from federal court scrutiny. Congress has the power to curtail the jurisdiction of inferior article III courts[78] because it was required by the Constitution neither to create them[79] nor to invest them, if created, with all of the jurisdiction authorized to them by article III.[80] On several occasions Congress has withdrawn

76. But the context in which this was stated involved a successful attempt by the USCMA to expand its jurisdiction under the All Writs Act, 28 U.S.C. § 1651 (1970), with no issue of federal court review involved. Accordingly, *Frischholz* cannot be viewed as an authoritative interpretation of the effect of article 76 on federal court jurisdiction, particularly since the expansion of nonhabeas review predominantly occurred subsequent to that decision. Earlier, in United States v. Armbruster, 11 U.S.C.M.A. 596, 598, 29 C.M.R. 412, 414 (1960), the USCMA stated that its determinations were final "subject only to review by the Supreme Court on constitutional issues . . . ."

The court in Brown v. United States, 365 F. Supp. 328 (E.D. Pa. 1973), *aff'd.*, 508 F.2d 618 (3d Cir. 1975), gave article 76 a reading similar to that of the Supreme Court in *Councilman*:

> The provisions of § 876 embodied a concept of legal finality, and must be read to encompass the normal collateral exceptions to such finality. One of those exceptions is and has always been that complete lack of jurisdiction in the narrow sense may be raised in any available proceedings. . . . [I]f Congress had wished to eliminate this by 10 U.S.C. § 876, and thereby put a punitively discharged or unincarcerated person convicted by an illegally convened authority on such a radically different footing than a person "in custody," the Court feels it would have said so more clearly and directly.

365 F. Supp. at 335-36.

77. *See* text at note 55 *supra.*

78. "Simply stated, Congress may impart as much or as little of the judicial power as it deems appropriate and the Judiciary may not thereafter on its own motion recur to the Article III storehouse for additional jurisdiction. When it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth, and the Congress taketh away." Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973). *See* Glidden Co. v. Zdanok, 370 U.S. 530, 551 (1962); Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845); Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 10 n.1 (1799). *But see* Reynolds v. Sims, 377 U.S. 533, 582 (1964) ("Congress simply lacks the constitutional power to insulate states from attack with respect to alleged deprivations of individual constitutional rights."). *Cf.* Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948). Eisenberg, *Congressional Authority To Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 532-33 (1974), concludes that Congress cannot withdraw federal jurisdiction to hear cases in which constitutional rights are at stake or to grant constitutionally required remedies. In the author's view this follows from the conclusion that Congress could not abolish the lower federal courts. *See id.* at 504-13. The author states that "[i]t may well suffice to provide an appeal to a subordinate federal court from state courts [on constitutional issues], as long as such forums are generally available." *Id.* at 533.

79. *See* Palmore v. United States, 411 U.S. 389, 401 (1973); Glidden Co. v. Zdanok, 370 U.S. 530, 551 (1962) (plurality opinion); Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); 1 M. FARRAND, *supra* note 22, at 118, 124-25 (1911). *But see* Eisenberg, *supra* note 78, at 504-13, where it is asserted that the existence of lower federal courts in some form is constitutionally required.

80. Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845). Justice Story's opinion in

jurisdiction from federal courts over certain classes of cases.[81] Moreover, in aid of the powers enumerated in articles I and IV, Congress may establish various legislative courts,[82] such as courts-martial,[83] with the power to hear certain cases within the article III "judicial power" that would otherwise be cognizable by article III courts.[84]

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), suggests the contrary, but in his later opinion in White v. Fenner, 1 Mason 520 (No. 17,547) (C.C.R.I. 1818), he held that the jurisdiction of inferior federal courts is statutorily limited, and that Congress need not extend their jurisdiction to the full scope of the judicial power as defined in article III, § 2. The article III, § 2, grant of jurisdiction to federal courts in cases arising under the laws of the United States thus is not self-executing, and the fact that a case arises under federal law does not mean that an inferior article III court has jurisdiction over it. Boyk v. Mitchell, 312 F. Supp. 934, 937 (N.D. Ohio 1969), *affd.*, 425 F.2d 263 (6th Cir. 1970).

The question whether Congress may extend the jurisdiction of article III courts *beyond* the judicial power as defined in § 2 has been answered in the negative. Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973).

81. *See, e.g.*, the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1970) (restricting power of United States courts to issue injunctions in labor disputes); 28 U.S.C. § 1341 (1970) (limiting federal court power to enjoin or restrain assessment or collection of state taxes); 26 U.S.C. § 7421 (1970) (limiting federal court jurisdiction to entertain suits to restrain assessment or collection of federal taxes). *See* Lockerty v. Phillips, 319 U.S. 182 (1943); Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

82. *See* Palmore v. United States, 411 U.S. 389 (1973) (art. I courts established to govern the District of Columbia); *Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929) (Court of Customs Appeals set up under the authority of art. I, § 8, cl. 1, empowering Congress to make laws necessary and proper to aid in the collection of import duties); *In re* Ross, 140 U.S. 453 (1891) (consular court); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (territorial courts).

83. The system of military justice was established pursuant to U.S. CONST. art. I, § 8, cl. 14, granting Congress the power to "make Rules for the Government and Regulation of the land and naval Forces," and the other enumerated military powers. Courts-martial are thus under the control of the political branches of government, deriving their power and jurisdiction from a source independent of article III of the Constitution. Parker v. Levy, 417 U.S. 733, 766 (1974) (Douglas, J., dissenting); Gosa v. Mayden, 413 U.S. 665, 686 (1973); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 237, 247 (1960); Whelchel v. McDonald, 340 U.S. 122, 127 (1950); Tarble's Case, 80 U.S. (13 Wall.) 397, 408 (1871); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79, 82 (1858); W. WINTHROP, *supra* note 1, at 79. To end any remaining doubts, Congress amended the UCMJ in 1968 to provide that the Court of Military Appeals was "established under article I of the Constitution of the United States." Act of June 15, 1968, Pub. L. No. 90-340, § 1, 82 Stat. 178, *amending* UCMJ art. 67, 10 U.S.C. § 867 (1970). Congress is limited in the jurisdiction it can constitutionally vest in courts established under U.S. CONST. art. I, § 8, cl. 14. Thus, limits exist on the personal jurisdiction of courts-martial. *See, e.g.*, McElroy v. Guagliardo, 361 U.S. 281 (1960) (civilian employee not triable for noncapital offense); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (dependents of servicemembers not triable for noncapital offense); Reid v. Covert, 354 U.S. 1 (1957) (civilians may not be court-martialed in time of peace). The subject-matter jurisdiction of courts-martial is limited to "service-connected" offenses. O'Callahan v. Parker, 395 U.S. 258 (1969).

84. Glidden Co. v. Zdanok, 370 U.S. 530, 544-45, 549 (1962); Williams v. United States, 289 U.S. 553, 567 (1933); *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929). It has been well established that the Constitution does not require every question arising under federal law to be tried in an article III court. *E.g.*, Palmore v. United States,

Inferior federal courts may constitutionally be denied jurisdiction to intervene in such cases provided that the legislative courts' procedures meet due process standards.[85]

The Court correctly concluded, however, that the few scattered references bearing on the issue in the legislative history of article 76 were insufficient to evidence an "affirmative intent" on behalf of Congress to limit federal court review to habeas corpus cases.[86] In the first place, there was considerable precedent for nonhabeas review of a narrow scope[87] when Congress enacted the finality provision in 1948, although such precedent was not mentioned in the congressional history. Civil trespass and related actions had been maintained in the nineteenth century against officials who executed court-martial sentences, and in deciding whether to award damages courts had examined the validity of the underlying convictions.[88] It is perhaps understandable that this precedent was overlooked, for by the twentieth century tort law had granted immunity to officers executing facially valid judgments, virtually closing this avenue of

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411 U.S. 389, 407 (1973). Courts established under other constitutional provisions, as well as state courts, *see, e.g.*, Testa v. Katt, 330 U.S. 386, 392 (1947), have been relied upon by Congress to hear federal question cases.

85. *See* Yakus v. United States, 321 U.S. 414, 443 (1944); Hart, *supra* note 81, at 1367-70, 1387-401. Actions in legislative courts are not reviewable by federal courts if they are not within the judicial power as defined by article III, *see, e.g.*, Federal Radio Commn. v. General Elec. Co., 281 U.S. 464 (1930); *Ex parte* Bakelite Corp., 279 U.S. 438 (1929); Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923), because article III is a constitutional limit on federal court jurisdiction. Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809). *But see* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 600 (1949) (plurality opinion).

Federal courts have intervened in court-martial proceedings in a few instances upon a showing that the procedure violated due process, *e.g.*, Henry v. Warner, 357 F. Supp. 495 (C.D. Cal. 1973), *vacated*, 493 F.2d 1231 (9th Cir.), *cert. granted sub nom.* Middendorf v. Henry, 419 U.S. 895 (1974) (No. 74–175) (injunction entered against all Marine Corps summary courts-martial where no counsel provided at pre-trial stage), or that the statute under which the petitioner was charged was unconstitutional on its face. *E.g.*, McCahill v. Eason, 361 F. Supp. 588 (N.D. Fla. 1973) (pre-trial habeas corpus writ issued because of unconstitutionality of article 134 of the UCMJ, 10 U.S.C. § 934 (1970)). *But see* Locks v. Laird, 441 F.2d 479 (9th Cir.), *cert. denied*, 404 U.S. 986 (1971) (exhaustion of intra-service remedies required before petitioner may challenge regulation in federal court). Such intervention is rarely appropriate, however, for the defendant does not often challenge military judicial procedures as facially invalid. Exhaustion is required when the defendant alleges that the procedure is unconstitutional only as applied to him. *See, e.g.*, Torres v. Connor, 329 F. Supp. 1025 (N.D. Ga. 1970) (allegations of command influence, prejudicial pre-trial publicity).

86. 43 U.S.L.W. at 4436-37.

87. All federal court review of court-martial convictions, including habeas corpus review, was of a narrow scope prior to 1948. *See* note 27 *supra*.

88. *See, e.g.*, Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857) (false imprisonment and assault and battery); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) (replevin); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820) (trespass); Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806).

review.[89] A precedent of continuing validity, however, was the action in the Court of Claims for pay and allowances forfeited by court-martial sentences.[90] This action also required decisions on the validity of underlying court-martial convictions. Furthermore, while no federal court asserted the power to review court-martial judgments in suits for injunctive, declaratory, or mandamus relief, such review was available with respect to military *administrative* actions;[91] it was not clear that court-martial convictions could not have been similarly reviewed.[92]

Perhaps Congress failed to discuss these avenues of nonhabeas review because of language in a prominent 1946 Supreme Court case, *In re Yamashita*:[93] "[T]he military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. . . . Congress conferred on the courts no power to review their determinations save as it has granted judicial power 'to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.' "[94] This declaration ignored the above precedents, however, and, having been uttered in a habeas corpus action, should have been discounted as dictum. Another possible reason for Congress' omission is that,

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89. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 25, at 127-29, § 132 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 122-24, 145, 266 (1965); Weckstein, *supra* note 3, at 14.

90. *See, e.g.*, United States v. Brown, 206 U.S. 240 (1907); Swaim v. United States, 165 U.S. 553 (1897); Keyes v. United States, 109 U.S. 336 (1883); Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

91. The plaintiff in Patterson v. Lamb, 329 U.S. 539 (1947), challenged his administrative discharge in a suit requesting declaratory and injunctive relief. In Denby v. Berry, 263 U.S. 29 (1923), mandamus was allowed to review an order of the Secretary of the Navy directing the release of the plaintiff from active duty in the Navy.

In United States *ex rel.* French v. Weeks, 259 U.S. 326 (1922), and a companion case, United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922), mandamus relief was requested in suits to review the actions of a military administrative classification board. In both cases the Court stated simply that the relief was unavailable where the military tribunal was lawfully constituted and acting within its jurisdiction.

92. In Wales v. Whitney, 114 U.S. 564, 570 (1885), the Court stated that it was not "authorized to interfere with [a naval court-martial] in the performance of its duty, by way of a writ of prohibition or any order of that nature." But the Court a year later deemed the availability of such a writ an issue of first impression, denying the writ on the merits without deciding the jurisdictional issue. Smith v. Whitney, 116 U.S. 167 (1886). The issue has remained unresolved. *See* Chavez v. Ferguson, 266 F. Supp. 879 (N.D. Cal. 1967), *appeal dismissed as moot*, 395 F.2d 215 (9th Cir. 1968); United States v. Maney, 61 F. 140 (C.C.D. Minn. 1894). Mandamus relief was requested in Carter v. Woodring, 92 F.2d 544 (D.C. Cir.), *cert. denied*, 302 U.S. 752 (1937), but was denied on the merits.

93. 327 U.S. 1, 8, *quoting* 28 U.S.C. §§ 451, 452 (1940), *as amended*, 28 U.S.C. § 2241 (1970).

94. The Court made a similarly broad statement in another habeas corpus action, Gusik v. Schilder, 340 U.S. 128, 132 (1950): "[Military tribunals] have operated in a self-sufficient system, save only as habeas corpus was available to test their jurisdiction in specific cases."

while these actions decided the validity of court-martial convictions, the convictions were not actually overturned when relief was granted.[95] This explanation seems unlikely, however, because habeas corpus relief at that time[96] also did not disturb the court-martial judgment, being limited to release from custody.[97] Yet Congress made several references to the continued availability of habeas corpus relief in the legislative history of article 76.[98]

Congress also failed to mention the power of the Boards for Correction of Military Records, established by the Legislative Reorganization Act of 1946,[99] to recommend the correction of military records when "necessary to correct an error or remove an injustice."[100] A 1947 Opinion of the Attorney General had affirmed that this power extended to court-martial sentences.[101] The power of the Service Secretaries to grant clemency on the Boards' recommendations[102] also went unmentioned. While the fact that none of these avenues of nonhabeas review were cited in the legislative history of article 76 weakens their importance as indicators of congressional intent, it is also unlikely that Congress meant to foreclose their use without discussion.

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95. *See* Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806) (trespass). Not until 1972 could the Court of Claims "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." 28 U.S.C. § 1491 (Supp. II, 1972).

96. Habeas relief today may be accompanied by orders declaring the conviction void and restoring "[a]ll rights, privileges and property of which the petitioner has or would be deprived by virtue of the judgment of the court and execution of the sentence adjudged at that court-martial." Wishmeyer v. Bolton, 361 F. Supp. 629, 630 (N.D. Fla. 1973), *vacated mem.*, 498 F.2d 911 (5th Cir. 1974). *See* Fay v. Noia, 372 U.S. 391, 469 (1963) (Harlan, J., dissenting). Such orders are needed because the disabilities of a conviction extend beyond release from confinement. *Cf.* Carafas v. LaVallee, 391 U.S. 234 (1968).

97. *See* Wales v. Whitney, 114 U.S. 564, 570 (1885).

98. *See House Hearings*, *supra* note 41, at 799; H.R. REP. No. 491, *supra* note 45, at 7 (Court of Military Appeals is to be "the court of last resort for court-martial cases, except for the constitutional right of habeas corpus"). Senator Kefauver, discussing article 76, pointed out that "Congress, through its enactment, did not, and could not, . . . intend to take away the jurisdiction of the Supreme Court or of other courts in habeas corpus matters." 96 CONG. REC. 1414 (1950).

99. 60 Stat. 837 (1940), *as amended*, 10 U.S.C. § 1552 (1970).

100. 10 U.S.C. § 1552 (1970). The provision states that the Secretary of each military department, acting through civilian boards, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Congress intended these Boards to eliminate the earlier necessity for aggrieved military personnel to seek private legislative bills for relief. Since the remedial purpose of this legislation was to accord the kind of relief that Congress could have given directly in an individual case, the power of the Boards has been broadly construed to provide potential relief notwithstanding the "finality" or conclusiveness of the decisions of other military authorities. Craycroft v. Ferrall, 408 F.2d 587, 592 (9th Cir. 1969), *vacated on other grounds*, 397 U.S. 335 (1970).

101. 40 OP. ATTY. GEN. 504, 509 (1947).

102. 10 U.S.C. § 1552 (1970).

Two further reasons, not suggested in *Councilman*, support a reading of article 76 not to preclude nonhabeas review. First, a well-recognized canon of statutory construction provides that statutes should be read so as to avoid constitutional issues.[103] Were article 76 construed to bar nonhabeas review, constitutional and other federal issues arising in court-martial cases not reviewable by habeas corpus would be entirely cut off from Supreme Court appellate scrutiny.[104] While it seems clear that Congress can deny jurisdiction over these issues to inferior federal tribunals,[105] less clear is Congress' power to except from the Supreme Court's appellate jurisdiction cases within the article III, section 2, definition of the judicial power,[106] such as cases arising in courts-martial.[107] This potential

103. *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 366-67 (1974); United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971).

104. Direct appeal on certiorari to federal courts is unavailable. *See* note 1 *supra* and accompanying text.

105. *See* text at notes 78-81 *supra*. The Constitution does not require that every federal question, including criminal prosecutions for violating Acts of Congress, be tried in an article III court. Palmore v. United States, 411 U.S. 389, 407 (1973). To the extent courts-martial are viewed as administrative bodies rather than as legislative courts, however, the result may be different. As Justice Douglas has pointed out, "[w]hether the Constitution permits Congress to forbid an Art. III court to review constitutional challenge to administrative penalties is a question the Court has not addressed explicitly." Jones v. United States, 419 U.S. 907, 910 (1974) (Douglas, J., dissenting from denial of certiorari). The Court has on several occasions suggested that the complete preclusion of judicial review of administrative action raises constitutional issues. *See* Johnson v. Robison, 415 U.S. 361, 366-67 (1974); Estep v. United States, 327 U.S. 114, 120 (1946). *See also* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); Ng Fung Ho v. White, 259 U.S. 276, 284-85 (1922).

106. The jurisdiction of the Supreme Court is derived directly from the Constitution, Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922), although subject to "such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2. The "exceptions and regulations" clause appears to leave little room for disputing the power of Congress to divest the Court of its commission to review certain types or classes of cases, and the Court has on one occasion recognized this power. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). In United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), the Court confronted the issue whether Congress could cut off all access from the Court of Claims, then considered an article I court, to the Supreme Court. While holding on the facts that Congress did not properly cut off the right of appeal, the Court indicated that Congress had the ability to do so in exercise of its power to make exceptions to the Supreme Court's appellate jurisdiction. 80 U.S. (13 Wall.) at 145. Other than in these dated cases, however, the scope of the congressional power to limit the Court's jurisdiction has been only scantily explored, usually in casual dicta. *See* Yakus v. United States, 321 U.S. 414, 472-73 (1944) (Rutledge, J., dissenting); The "Francis Wright," 105 U.S. 381, 385 (1881); Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865); Barry v. Mercein, 46 U.S. (5 How.) 103, 119-21 (1847); Durousseau v. United States, 10 U.S. (6 Cranch) 307 (1810); Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796).

Numerous commentators have offered constructions of the "exceptions and regulations" clause that seriously limit Congress' power, and that, applied to the court-martial setting, would cast constitutional doubts on the total preclusion of nonhabeas review. It has been suggested, for example, that any case "excepted" from the Supreme Court's appellate review must be included within its original jurisdiction, Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 32-33; that the

constitutional difficulty cautions against reading article 76 to preclude nonhabeas review.

Second, construing article 76 to allow nonhabeas review would accord with the interpretation of finality provisions in administrative law.[108] As Professor Davis has stated, "the most striking feature of the law of reviewability is the unreliability of the literal words of statutes, no matter how clear and unequivocal."[109] Thus, even in the face of explicit finality language, courts generally review administrative action to determine whether it exceeds the agency's jurisdiction or lacks a basis in fact.[110] In addition, courts will almost always

clause was meant only to permit restriction of the Court's review of questions of fact, not of substantive constitutional matters, R. BERGER, CONGRESS V. THE SUPREME COURT 285-96 (1969); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); that no matter how broad the general scope of legislative authority under article III, its exercise is limited by other constitutional provisions that may themselves condemn certain denials of Supreme Court review to particular classes of persons, Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 263-69 (1973); and that if a case is "excepted" from the Court's appellate purview, then jurisdiction over it must be vested in a lower federal court and some path must remain to permit the constitutional questions it raises to reach the Supreme Court, 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 610-18 (1953).

107. Military courts handle cases that in a literal sense arise under the laws of the United States, and that presumably could be added by Congress to the jurisdiction of article III courts. The Supreme Court has specifically stated that cases arising under laws passed by Congress in the exercise of its exclusive legislative power over the District of Columbia, *see* U.S. CONST. art. I, § 8, cl. 17, come within the judicial power of article III courts. Pernell v. Southall Realty, 416 U.S. 363, 368 (1974). Congress, however, has chosen to make such suits cognizable by article I rather than article III courts. Palmore v. United States, 411 U.S. 389, 410 (1973). Presumably cases arising under laws passed pursuant to the congressional military power fall in the same category.

108. In the administrative law area, courts generally have required clear evidence of legislative intent to preclude judicial review before that conclusion will be inferred. *See* Tooahnippah v. Hickel, 397 U.S. 598, 606 (1970); Barlow v. Collins, 397 U.S. 159, 166 (1970); City of Chicago v. United States, 396 U.S. 162, 164 (1969); Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1097-98 (D.C. Cir. 1970); Fekete v. U.S. Steel Corp., 424 F.2d 331, 334-35 (3d Cir. 1970).

109. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.01, at 2 (1958). Professor Davis goes on to state: "When statutes are silent concerning judicial review, as many are, the administrative action is sometimes reviewable, and sometimes not. When statutes provide that the administrative action 'shall be final,' the action is sometimes reviewable and sometimes not. When statutes provide that the action 'shall not be reviewed,' the action is sometimes reviewed and sometimes not." *Id.* at 2-3 (footnotes omitted).

110. In Estep v. United States, 327 U.S. 114 (1946), the Supreme Court faced a provision making final the decisions of local Selective Service boards. The Court interpreted the provision to mean that finality attached only when the boards acted within their respective jurisdictions. The decisions of local boards made in conformity to regulations were thus final even through erroneous. But where a decision had no basis in fact, the question of jurisdiction was reached, and federal courts had the power to intervene. The plaintiff in Harmon v. Brucker, 355 U.S. 579 (1958), received administratively a less than honorable military discharge and sought judicial review of the Army Review Board's refusal to change it. A provision made the actions of that Board final, subject only to review by the Secretary of the Army. "Generally,"

rectify clear statutory violations,[111] and constitutional challenges to the statute under which administrative action is taken are not precluded by provisions making final all action taken under the statute.[112] In short, finality provisions typically have not been construed to cut off all judicial review.[113]

The administrative law analogy is appropriate because courts-martial, like administrative agencies, differ from ordinary courts, although not in the same respects. First, courts-martial are ad hoc tribunals set up to hear specific cases.[114] Second, they lack regularly assigned judges, and may even be convened without any legally trained officers.[115] Third, review of the vast majority of court-martial judgments is ex parte, in contrast to the adversarial nature of pro-

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the Court stated, "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." 355 U.S. at 581-82. Despite the finality provision, if a federal court construing the statutes involved determines that the official had exceeded his powers, "his actions would not constitute exercises of his administrative discretion and judicial review from this illegality would be available." 355 U.S. at 582.

111. The plaintiff in Oestereich v. Selective Serv. Bd., 393 U.S. 233 (1968), sought pre-induction review of his draft classification, but faced a statute providing that "there shall be no pre-induction judicial review of the classification or processing of any registrant." Apparently the plaintiff's only means of obtaining judicial review was by suing for a writ of habeas corpus after induction or defending a criminal prosecution for failure to submit to induction. The Court allowed the action, however, stating that to preclude pre-induction judicial review in the instance of a clear statutory violation by the local board would be "to construe the Act with unnecessary harshness." 393 U.S. at 238-39. *Accord*, Manges v. Camp, 474 F.2d 97, 99 (5th Cir. 1973): "There is, however, a very strong court created exception to [jurisdiction] withdrawal statutes. This exception comes into play when there has been a clear departure from statutory authority."

112. In Johnson v. Robison, 415 U.S. 361, 367 (1974), the plaintiff was allowed to challenge certain provisions of the Veterans' Benefits Act despite a provision stating that "the decision of the Administrator on any question of law or fact under any law administered by the Veterans' Administration . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision . . . ." 38 U.S.C. § 211(a) (1970). For a critique of this decision, see Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 907-11 (1975).

113. *But see* Heikkila v. Barber, 345 U.S. 229 (1953), which read the provision making final all deportation orders of the Attorney General as limiting review to habeas corpus. The Court relied heavily upon the long history of limiting judicial review to habeas corpus in the deportation area. Importantly, the Court's reading merely limited the timing of review, for habeas corpus was available at some point to all deported aliens. The reading was thus in accordance with the expressed congressional desire to minimize repetitious litigation.

114. *Cf.* UCMJ arts. 22-24, 10 U.S.C. §§ 822-24 (1970). The three types of courts-martial—general, special, and summary—differ significantly in the formality of the trial proceedings and the thoroughness of review. Generally, the more serious the substantive offense, the more procedural safeguards protect the accused servicemember and, presumably, the less likely prejudicial error is to go undetected. *See* UCMJ arts. 16-20, 25-27, 32-34, 38, 54, 65-67, 10 U.S.C. §§ 816-20, 825-27, 832-34, 838, 854, 865-67 (1970); H. MOYER, *supra* note 36, at §§ 2-300 to -678; Moyer, *supra* note 21; Sherman, 22 MAINE L. REV. 3, *supra* note 21, at 59-103.

115. UCMJ art. 16, 10 U.S.C. § 816 (1970); MCM, *supra* note 24, ¶ 4.

ceedings before civilian appellate tribunals.[116] Each of these factors justifies a broad construction of the finality language in article 76.

Assuming that article 76 does not *bar* federal court jurisdiction over suits seeking nonhabeas review of court-martial convictions, the plaintiff must still find a *positive statutory basis* for the exercise of such jurisdiction. The several bases plaintiffs might advance in this regard can best be examined from a historical perspective. Prior to 1965, most courts passing on suits for nonhabeas relief paid little attention to article 76 or to other specific jurisdictional issues.[117] In 1950 the District of Columbia[118] and Fourth Circuits[119] concluded summarily that federal courts lacked jurisdiction over nonhabeas actions. A district court in 1958 read article 76 to preclude nonhabeas review, but offered no reasons for so holding.[120] On the other

116. *See* H. MOYER, *supra* note 36, at §§ 2–750 to –767.

117. Although the Supreme Court mentioned article 76 several times in reviewing habeas proceedings, *e.g.*, Burns v. Wilson, 346 U.S. 137, 142 (1953); Gusik v. Schilder, 340 U.S. 128, 132-33 (1950), it had no occasion to consider the provision's impact on federal court jurisdiction over actions for nonhabeas relief. In *Gusik*, the Supreme Court held that habeas corpus actions were not barred by article 76, opaquely reading the provision "as doing no more than describing the terminal point for proceedings within the court martial system." 340 U.S. at 132. The habeas corpus writ was discharged in *Gusik* because the allegations did not rise to a constitutional level.

118. *See* Goldstein v. Johnson, 184 F.2d 342, *cert. denied*, 340 U.S. 879 (1950). The court in *Goldstein* was faced with a request for a declaratory judgment and a mandatory injunction to set aside a court-martial proceeding. Allegedly the court-martial and its subsequent review were part of a fraudulent conspiracy to cover up administrative errors and the appellant was deprived of his right to civilian counsel of his own choice, contrary to the Articles of War, and denied an opportunity to introduce certain evidence in his behalf because the court-martial tribunal wrongfully refused to grant a continuance. Appellant's charges were of a constitutional nature and did not challenge the jurisdiction of the court-martial or the propriety of its convening or constitution. Four months earlier the Supreme Court had indicated in Hiatt v. Brown, 339 U.S. 103 (1950), that constitutional error not going to the court-martial's jurisdiction in the traditional sense would not be rectified by federal courts. The *Goldstein* court thus could have dismissed the action on the ground that the alleged error was not within its scope of review. Perhaps the court had this in mind, but it went further and stated explicitly that in the absence of physical confinement, a prerequisite for habeas corpus relief, it was without power to interfere with or in any way review court-martial proceedings. An earlier district court decision, Brown v. Royall, 81 F. Supp. 767 (D.D.C.), *aff'd.*, (D.C. Cir. 1949) (unreported), *cert. denied*, 339 U.S. 952 (1950), dismissed for lack of jurisdiction a request for declaratory and injunctive relief in which the convicted serviceman alleged that the court-martial that convicted him was without personal jurisdiction. The district court noted that to its knowledge no civil court had undertaken to pass upon the validity of a court-martial in a declaratory judgment proceeding. 81 F. Supp. at 768.

119. Stock v. Department of the Air Force, 186 F.2d 968 (1950).

120. Alley v. Chief, Finance Center, 167 F. Supp. 303 (S.D. Ind. 1958) (dictum). The action was interpreted as requesting mandamus relief and thus was properly dismissed, since federal courts outside of the District of Columbia were unable to grant such relief until 1962. *See* 28 U.S.C. § 1361 (1970). *Accord*, Harris v. United States, 204 F. Supp. 228, 230 (D. Mass.), *aff'd.*, 308 F.2d 573 (1st Cir. 1962). The court in Hooper v. Hartman, 163 F. Supp. 437, 441-42 (S.D. Cal. 1958), *aff'd.*, 274 F.2d 429 (9th Cir. 1959), concluded that a declaratory judgment was unavailable to a serviceman who had not exhausted his intra-service remedies.

hand, the Court of Claims consistently assumed jurisdiction over back-pay suits, without mentioning article 76.[121] In 1957 a District of Columbia district court held that it could review court-martial convictions in suits requesting declaratory and injunctive relief, but cited no supporting authority and failed to mention article 76 or the contrary 1950 decisions.[122] In response to the defendant's jurisdictional challenge, the court stated that while it could not review the decisions of courts-martial acting within their jurisdiction, it "unquestionably" had the duty in any collateral proceeding to determine the underlying jurisdictional facts.[123]

The first reasoned assertion of jurisdiction over nonhabeas suits occurred in 1965 in *Ashe v. McNamara*,[124] when the First Circuit determined that federal courts could mandamus the several Boards for Correction of Military Records to rectify the breach of a plain duty to grant relief. The Correction Boards, with the approval of the Service Secretaries, change records of servicemembers convicted by courts-martial—most frequently changing punitive discharges to honorable discharges. Their actions are thus implicit exceptions to article 76.[125] Since actions of the Boards are reviewable by federal courts[126] and mandamus is appropriate to compel them to grant

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121. *See, e.g.*, Griffiths v. United States, 172 F. Supp. 691 (Ct. Cl.), *cert. denied*, 361 U.S. 865 (1959); Krivoski v. United States, 145 F. Supp. 239 (Ct. Cl.), *cert. denied*, 352 U.S. 954 (1956); Fly v. United States, 100 F. Supp. 440 (Ct. Cl. 1951); Sima v. United States, 96 F. Supp. 932 (Ct. Cl. 1951).

122. Jackson v. Wilson, 147 F. Supp. 296, 297-98 (1957). The court denied the defendant's motions to dismiss and to grant summary judgment, concluding that there was a genuine issue as to the facts underlying the court-martial's jurisdiction. Although relief eventually was denied, *see* Jackson v. McElroy, 163 F. Supp. 257 (D.D.C. 1958), the court specifically upheld its jurisdiction to investigate the plaintiff's allegations that the court-martial that convicted him had been improperly convened and constituted. In neither decision did the court state what general jurisdictional statute applied or in what manner the plaintiff had satisfied any jurisdictional amount requirement.

123. 147 F. Supp. at 298.

124. 355 F.2d 277 (1st Cir. 1965). The district court interpreted the suit as a request for a declaratory judgment. Quoting article 76, the court stated it had no power to inquire into the jurisdiction of a court-martial in a declaratory judgment action, and thus dismissed for lack of jurisdiction. Ashe v. McNamara, 243 F. Supp. 243, 244 (D. Mass.), *revd.*, 355 F.2d 277 (1st Cir. 1965).

125. It is not completely clear in light of article 76 that the Boards can review the actions of courts-martial. An early Attorney General's Opinion concluded that unless this power did exist, the purpose of the act establishing the Boards—to relieve Congress of the burden of considering private bills for relief—would not be adequately fulfilled. 41 OP. ATTY. GEN. 4 (1949). Most courts have concluded that the Boards do have this power. *E.g.*, Ragoni v. United States, 424 F.2d 261, 263 (3d Cir. 1970); Smith v. McNamara, 395 F.2d 896, 899 (10th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969); Ashe v. McNamara, 355 F.2d 277, 282 (1st Cir. 1965). *See* Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971). *But see* Parrish v. Seamans, 343 F. Supp. 1087, 1092 (D.S.C. 1972), *affd.*, 485 F.2d 571 (4th Cir. 1973) ("This court is not impressed with the argument that the finality provision of Article 76 was modified by 10 U.S.C. § 1552.").

126. *See* Ashe v. McNamara, 355 F.2d 277, 280-81 (1st Cir. 1965); Jones, *Jurisdiction*

relief, the *Ashe* court held that mandamus could be used to review court-martial convictions indirectly.

The use of mandamus made by *Ashe* has become a well-accepted means of reviewing court-martial convictions.[127] Recently, a second use of mandamus was attempted. In *Brown v. United States*[128] the Third Circuit faced a class-action suit by servicemembers seeking a mandamus writ ordering the Secretary of the Navy to expunge their court-martial convictions and return all forfeited pay and allowances. Although it denied relief on the merits, the district court in a lengthy opinion upheld the jurisdiction of federal courts to order military officials to exercise their clemency powers[129] to expunge convictions and to return liquidated amounts of fines and forfeitures.[130] On appeal, the government conceded federal court jurisdiction under the Tucker Act[131] for claims against the government of less than $10,000 (in this case, the claims for fines and forfeited pay and allowances), but argued that federal courts did not have jurisdiction to order the grant of clemency by mandamus. In response, the Third Circuit stated: "Since the government concedes that there is Tucker Act jurisdiction . . . we must reach the merits of the appeal in any case. As a result, since we ultimately reject the plaintiffs' underlying cause of action, there is no need to finally decide whether mandamus jurisdiction exists since a decision on this question would do no more than expand or narrow the remedies available to the plaintiffs if they prevailed on the merits."[132]

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of the Federal Courts To Review the Character of Military Administrative Discharges, 57 COLUM. L. REV. 917, 967-69 (1957).

127. *See, e.g.*, Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971); Angle v. Laird, 429 F.2d 892 (10th Cir. 1970), *cert. denied*, 401 U.S. 918 (1971); Ragoni v. United States, 424 F.2d 261 (3d Cir. 1970); Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969); Brown v. United States, 365 F. Supp. 328 (E.D. Pa. 1973), *affd.*, 508 F.2d 618 (3d Cir. 1975); Williams v. Froehlke, 356 F. Supp. 591 (S.D.N.Y. 1973), *affd.*, 490 F.2d 998 (2d Cir. 1974); Lima v. Secretary of the Army, 314 F. Supp. 337 (E.D. Pa. 1970). *But cf.* Parrish v. Seamans, 343 F. Supp. 1087 (D.S.C. 1972), *affd.*, 485 F.2d 571 (4th Cir. 1973).

128. 508 F.2d 618 (3d Cir. 1975). *Accord* Lebron v. United States Secretary of the Air Force, 392 F. Supp. 219 (S.D.N.Y. 1975); Smith v. Secretary of the Navy, 392 F. Supp. 428 (W.D. Mo. 1974).

129. *See, e.g.*, 10 U.S.C. § 1552 (1970) (Service Secretary "may correct any record when he considers it necessary to correct an error or remove an injustice"); UCMJ art. 64, 10 U.S.C. § 864 (1970) (convening authority may reduce sentence to what "he in his discretion determines should be approved").

130. 365 F. Supp. 328, 336 (E.D. Pa. 1973), *affd.*, 508 F.2d 618 (3d Cir. 1975) ("To hold that mandamus to the Board is the only action over which this Court has jurisdiction, exhaustion aside, would unnecessarily tie the hands of the Federal Courts and is not a construction of the statute which should be adopted absent the clearest expression of congressional purpose. Such mandamus is only a thinly veiled use of the mandamus power to examine court-martial proceedings in any event.").

131. 28 U.S.C. § 1346(a)(2) (1970). *See* note 6 *supra*.

132. 508 F.2d at 619 n.1.

The mandamus statute, 28 U.S.C. § 1361, provides the servicemember with a cause of action and the federal courts with jurisdiction without regard to the amount in controversy.[133] There are three limitations on its use in obtaining nonhabeas collateral review, however. First, under traditional principles mandamus is available only when a manifestly nondiscretionary duty is owed the plaintiff, a duty "so plainly prescribed as to be free from doubt."[134] The Correction Boards, against whom mandamus suits are typically brought, have broad discretion to recommend mitigation of court-martial sentences,[135] since their function is not to provide direct review of court-martial convictions but rather to determine whether servicemembers are entitled to clemency relief comparable to, and in lieu of, private acts of Congress to correct military records.[136] Rarely

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133. The statute states in full: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to the plaintiff." Prior to the enactment of the statute in 1962, only the federal courts in the District of Columbia possessed mandamus power. The statute generally has been viewed as conferring similar jurisdiction on the other federal courts, and not as extending the scope of mandamus relief or creating new causes of action against the United States or its officials. *See, e.g.*, White v. Administrator of Gen. Servs. Administration, 343 F.2d 444, 447 (9th Cir. 1965); Massachusetts v. Connor, 248 F. Supp. 656, 659 (D. Mass.), *affd.*, 366 F.2d 278 (1st Cir. 1966); Dover Sand & Gravel, Inc. v. Jones, 227 F. Supp. 88, 90 (D.N.H. 1963); Seebach v. Cullen, 224 F. Supp. 15, 17 (N.D. Cal. 1963), *affd.*, 338 F.2d 663 (9th Cir. 1964), *cert. denied*, 380 U.S. 972 (1965).

134. Keeny v. Secretary of the Army, 437 F.2d 1151 (8th Cir. 1971). *Accord*, Richardson v. United States, 465 F.2d 844, 849 (3d Cir. 1972) (en banc); United States v. Walker, 409 F.2d 477, 481 (9th Cir. 1969); Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir. 1966). Mandamus is available to rectify abuse of discretion, Duffy v. Dier, 465 F.2d 416, 418 (5th Cir. 1972); United States *ex rel.* Schonbrun v. Commanding Officer, Armed Forces, 403 F.2d 371, 374 (2d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969) (when official conduct has gone "far beyond any rational exercise of discretion"), and to compel the exercise of discretion by an officer who has erroneously considered himself to lack it, United States v. Nebbia, 357 F.2d 303, 305 (2d Cir. 1966), but not to direct the manner in which discretionary acts are performed or to influence the exercise of discretion. National Indian Youth Council v. Bruce, 485 F.2d 97, 100 (10th Cir. 1973), *cert. denied*, 415 U.S. 946 (1974); McQueary v. Laird, 449 F.2d 608, 611 (10th Cir. 1971).

135. *See* text at note 100 *supra*.

136. Brown v. United States, 365 F. Supp. 328, 341 (E.D. Pa. 1973), *affd.*, 508 F.2d 618 (3d Cir. 1975); 41 OP. ATTY. GEN. 4 (1949); 40 OP. ATTY. GEN. 504, 508 (1947); *Developments*, *supra* note 8, at 1237. The Boards are not courts, are not necessarily composed of lawyers, and have little expertise in deciding legal issues. *See* United States *ex rel.* Brooks v. Clifford, 412 F.2d 1137, 1139-40 (4th Cir. 1969); Brown v. United States, 365 F. Supp. 328, 341 (E.D. Pa. 1973), *affd.*, 508 F.2d 618 (3d Cir. 1975); Letter from Air Force Board for Correction of Military Records to the *Michigan Law Review*, Feb. 27, 1975; Letter from Army Board for Correction of Military Records to the *Michigan Law Review*, Feb. 27, 1975; Letter from Navy Board for Correction of Naval Records to the *Michigan Law Review*, March 7, 1975 [hereinafter Letters]. *See also* Cole v. Laird, 468 F.2d 829, 831 (5th Cir. 1972). Lunding, *supra* note 74, at 70-71, states: "The boards rarely determine legal questions themselves. Instead each board relies almost exclusively on the opinions of its service's Office of the Judge Advocate General. Such reliance reduces 'review' of the legal issue to a futile pro forma exercise" (footnotes omitted).

would a court employing traditional mandamus principles find that the Boards owe a ministerial duty to a convicted servicemember.[137]

It is even more difficult to maintain that a military official with clemency powers has a ministerial duty to make record changes. Use of mandamus in this situation is similar to compelling state governors to exercise their clemency powers, which few would view as a proper use of the writ. Arguably, however, military authorities have no right to maintain records of unlawful convictions, and the correction of such records is a ministerial duty compellable by mandamus.[138] A court employing this reasoning would first decide that a conviction is unlawful and then hold that the military official owes a duty to correct it. This argument misconstrues the function of mandamus. In mandamus proceedings courts should determine whether the official whose action is challenged has discretion in taking that action. If so, courts may review only for an abuse of discretion; if not, the official's action is ministerial and subject to mandamus. Courts should not decide on equitable grounds how an official should exercise his discretion and then state that, in light of the courts' redetermination, the official's duty is nondiscretionary. To proceed in this manner would allow federal courts to exercise

137. *Cf.* Ragoni v. United States, 424 F.2d 261 (3d Cir. 1970); Carter v. Seamans, 411 F.2d 767, 773 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970); Parrish v. Seamans, 343 F. Supp. 1087, 1094 (D.S.C. 1972), *affd.*, 485 F.2d 571 (4th Cir. 1973).

138. *See* Brown v. United States, 365 F. Supp. 328, 331-32 (E.D. Pa. 1973), *affd.*, 508 F.2d 618 (3d Cir. 1975). An analogy might be drawn to the recent federal court practice of ordering the expungement of arrest records maintained by law enforcement officials upon a de novo determination that the arrest was made without probable cause or was otherwise in violation of the suspect's constitutional rights. *See* Menard v. Saxbe, 498 F.2d 1017, 1023 & n.13 (D.C. Cir. 1974); Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967); United States v. Seasholtz, 376 F. Supp. 1288, 1289 (N.D. Okla. 1974); United States v. Dooley, 364 F. Supp. 75, 78 (E.D. Pa. 1973) (expungement will not be ordered when the arrest was lawful). *Cf.* Paton v. LaPrade, 382 F. Supp. 1118 (D.N.J. 1974). *But cf.* Rogers v. Slaughter, 469 F.2d 1084 (5th Cir. 1972) (expungement of record of state conviction invalidated by federal court in collateral attack under 42 U.S.C. § 1983 (1970) should be left to discretion of state authorities). Since the consequences of an invalid conviction are clearly more severe than those of a simple arrest record, federal courts might similarly be willing to conduct de novo review of court-martial proceedings for constitutional error.

None of the arrest-record cases, however, involved the review of prior judicial determinations. The arrested plaintiffs were released without trial and without a chance for judicial scrutiny of their arrests. Moreover, those actions were brought under federal question (28 U.S.C. § 1331 (1970)) or civil rights (28 U.S.C. § 1343 (1970)) jurisdiction, not as mandamus actions. The courts were therefore free to employ equitable standards for granting relief, rather than traditional mandamus principles. Because of these dissimilarities it is doubtful that federal courts would analogize from the arrest-records cases to find that military officials owe ministerial duties to expunge records of invalid convictions.

Additionally, federal courts may be more reluctant to mandamus high military officials than local law enforcement officials over whom courts frequently exercise supervisory control. *See, e.g.*, FED. R. CRIM. P. 16(a), (b) (order for criminal discovery of government's evidence); 41(e) (order for return of property unlawfully seized by government).

plenary review of all executive and administrative decisions, a result clearly not the purpose of writs of mandamus.

A few courts have avoided the ministerial-duty limitation by equating mandamus actions with habeas proceedings and requiring Correction Boards or military officials to effect record changes whenever error in court-martial proceedings would justify granting habeas relief to servicemembers in custody.[139] Relief may then be granted whether or not pursuant to a ministerial duty.[140] This use of mandamus has rarely been accepted, however, for it substantially distorts the function of the writ.[141]

The second limitation on the use of mandamus in this setting arises from the fact that the Correction Boards effect only sentence changes and leave untouched the findings and judgments of courts-martial.[142] Even if successful, therefore, the mandamus petitioner is

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139. *See, e.g.*, Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969). The court spoke in terms of "the plain duty to grant relief" of the Secretary and the Correction Board, concluding that such a duty existed whenever a district court would have been obliged to grant a writ of habeas corpus. 395 F.2d at 899.

140. *See* Smith v. McNamara, 395 F.2d 896, 899 (10th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969).

141. The Third Circuit has been precise in disavowing a broad scope of inquiry: "[I]n considering a petition for a writ of mandamus the district court in these cases may not look beyond the administrative record. . . . This is so because the issue in such a mandamus action is whether the Correction Board acted arbitrarily or capriciously in view of the record before it." Ragoni v. United States, 424 F.2d 261, 263 (1970). *Accord*, Lima v. Secretary of the United States Army, 314 F. Supp. 337, 339 (E.D. Pa. 1970). *But see* Brown v. United States, 365 F. Supp. 328, 331-32 (E.D. Pa. 1973), *affd.*, 508 F.2d 618 (3d Cir. 1975). The Court in Parrish v. Seamans, 343 F. Supp. 1087, 1094 (D.S.C. 1972), *affd.*, 485 F.2d 571 (4th Cir. 1973), stated: "Mandamus is an extraordinary remedy . . . available only in rare cases as a last resort. Generally speaking, before the writ of mandamus may issue the plaintiff must have a clear right to relief, the defendant must have a clear duty to act, and there must be no other relief available."

Most of the decisions involving mandamus requests have been imprecise as to the standard of review. *E.g.*, United States *ex rel.* Flemings v. Chafee, 458 F.2d 544 (2d Cir. 1972), *revd. on other grounds sub nom.* Warner v. Flemings, 413 U.S. 665 (1973); Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971); Angle v. Laird, 429 F.2d 892 (10th Cir. 1970), *cert. denied*, 401 U.S. 918 (1971); Williams v. Froehlke, 356 F. Supp. 591 (S.D.N.Y. 1973), *affd.*, 490 F.2d 998 (2d Cir. 1974). In recent years commentators have persuasively argued that courts should be more willing to find the duty requirement satisfied, and that relief should not be denied simply because close questions of law are involved. *See* K. DAVIS, *supra* note 109, § 23.10 (Supp. 1970); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 181-83 (1965); Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 320, 331-36 (1967). Such suggestions have received scant judicial recognition, however. K. DAVIS, *supra*, § 23.10, at 806 (Supp. 1970) ("[a]uthority for moving away from the mandamus tradition under § 1361 is scanty and unsatisfactory"). Two decisions accepting these suggestions are United States *ex rel.* Joy v. Resor, 342 F. Supp. 70, 71 (D. Ct. 1972), and Cortright v. Resor, 325 F. Supp. 797, 812 (E.D.N.Y.), *revd. on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

142. *See* Goldstein v. Johnson, 184 F.2d 342, 344 (D.C. Cir.), *cert. denied*, 340 U.S. 879 (1950); 40 OP. ATTY. GEN. 504, 508 (1947); Letters, *supra* note 136. *See also* Davies

left with a federal conviction on his record and the disabilities flowing therefrom.[143] Similarly, mandamus would be unavailable to a convicted serviceman who had served his imprisonment term, if any, and who had not received a punitive discharge.[144]

The third limitation is that in mandamus actions only the records that were presented to the military officials or to the Correction Boards are examined, since that is the only information relevant in determining whether the officials or the Boards abused their discretion.[145] This limitation is also avoided by the dubious expedient of equating mandamus actions with habeas proceedings, because habeas review permits when necessary a de novo inquiry into the factual basis of alleged court-martial error.[146] In sum, although there is precedent for using mandamus to secure nonhabeas federal court relief from the effects of court-martial convictions, mandamus is properly limited to a very narrow range of situations.

A second method of nonhabeas collateral attack of court-martial judgments—an action for declaratory and injunctive relief—was first prominently tested in 1966. In *Gallagher v. Quinn*,[147] the District of

v. Clifford, 393 F.2d 496, 497 (1st Cir. 1968) (dictum). *Cf.* Cole v. Laird, 468 F.2d 829, 831 (5th Cir. 1972). For this reason, recent cases have not viewed action by these Boards as a remedy that must be exhausted prior to federal court review. *E.g.*, Cole v. Laird, 468 F.2d 829, 831 (5th Cir. 1972); Brown v. United States, 365 F. Supp. 328, 341-42 (E.D. Pa. 1973), *aff'd.*, 508 F.2d 618 (3d Cir. 1975). *See* H. MOYER, *supra* note 36, § 6-225, at 1198-201. *Cf.* McKart v. United States, 395 U.S. 185 (1969). This conclusion seems correct, because "[t]he basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Parisi v. Davidson, 405 U.S. 34, 37 (1972). *Accord*, McGee v. United States, 402 U.S. 479, 484-85 (1971); McKart v. United States, 395 U.S. 185, 193-95 (1969). The Correction Boards have little competence to adjudicate constitutional issues and compile no record to simplify judicial review. If exhaustion is required, its justification must rest on the Boards' capacity to moot judicial controversies by providing relief. *See* Craycroft v. Ferrall, 408 F.2d 587, 592-94 (9th Cir. 1969), *vacated*, 397 U.S. 335 (1970). The possibility of Board relief need not be exhausted in the review of Army administrative rulings. Parisi v. Davidson, 405 U.S. 34, 38 n.3 (1972).

143. *See* H. MOYER, *supra* note 36, at 1199: "Thus someone whose petition before a correction board is completely successful may have all the punitive consequences of a court-martial removed from his record, but the correction board will refuse, on jurisdictional grounds, to expunge the underlying conviction itself."

144. *See* Davies v. Resor, 445 F.2d 1331, 1332 (1st Cir. 1971). In an earlier decision involving the same petitioner, the court held that to entertain a declaratory judgment action in such a situation would amount to impermissible direct review of the court-martial conviction. Davies v. Clifford, 393 F.2d 496, 497 (1st Cir. 1968).

145. *See* Ragoni v. United States, 424 F.2d 261, 263 (3d Cir. 1970) ("[T]he issue in such a mandamus action is whether the Correction Board acted arbitrarily or capriciously *in view of the record before it.*") (emphasis added).

146. *See, e.g.*, De Champlain v. Lovelace, 510 F.2d 419 (8th Cir. 1975); Conrad v. Schlesinger, 507 F.2d 867 (9th Cir. 1974).

147. 363 F.2d 301 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966). The serviceman had been sentenced by a court-martial to a bad-conduct discharge, but the sentence was remitted by the Secretary of the Army. The court's reasoning in upholding federal

Columbia Circuit entertained a suit by a convicted enlisted man who had received an honorable discharge. The USCMA had denied discretionary direct review. Turning to federal court, Gallagher requested a mandatory injunction to compel the USCMA to hear his case, challenging on equal protection grounds the statute that gives the USCMA discretion to hear cases involving enlisted men but requires it to hear cases involving general or flag officers.[148] The court, presumably reluctant to enjoin the USCMA (over which federal courts have no supervisory authority), interpreted the suit as a request for declaratory relief. Defending the action, the Government claimed that federal courts lacked nonhabeas jurisdiction, relying on Supreme Court dictum and lower court holdings.[149] The court distinguished these precedents by noting that none involved a constitutional challenge to the validity of an act of Congress.[150] Because Gallagher did not request review of his conviction, the court properly ignored article 76. Relief was denied on the merits of the equal protection claim.

While Gallagher received nonhabeas review of an act of Congress, he did not obtain review of his conviction. Most servicemembers seeking declaratory and injunctive relief, however, want declarations that their convictions are invalid and mandatory injunctions to expunge all related records. Prior to 1969, federal courts viewed such suits as requesting impermissible direct review of courts-martial.[151] In three decisions beginning in that year the District of Columbia Circuit Court disagreed. In the first case, *Kauffman v. Secretary of the Air Force*,[152] the plaintiff requested declaratory relief and restoration to active duty. Relying heavily on *Ashe*[153] and *Gallagher*, the court considered only article 76 and concluded unequivocally that it did not bar nonhabeas review.[154] In the second case, *Homcy v.*

court jurisdiction was basically "that unless jurisdiction lies in the District Court in such a case as this, with appellate jurisdiction in this court and then in the Supreme Court, the constitutional validity of the Act of Congress cannot be decided except by the military tribunal." 363 F.2d at 304.

148. UCMJ art. 67(b), 10 U.S.C. § 867(b) (1970).

149. *See* notes 117-20 *supra* and accompanying text.

150. 363 F.2d at 303.

151. *See* Goldstein v. Johnson, 184 F.2d 342 (D.C. Cir.), *cert. denied*, 348 U.S. 879 (1950); Davies v. McNamara, 275 F. Supp. 278 (D.N.H. 1967), *aff'd. sub nom.* Davies v. Clifford, 393 F.2d 496 (1st Cir. 1968); Ashe v. McNamara, 243 F. Supp. 243 (D. Mass.), *rev'd.*, 355 F.2d 277 (1st Cir. 1965) (*see* text at note 124 *supra*); Brown v. Royall, 81 F. Supp. 767 (D.D.C.), *aff'd.*, (D.C. Cir. 1949) (unreported), *cert. denied*, 339 U.S. 952 (1950). *See also* Harris v. United States, 204 F. Supp. 228, 230 (D. Mass.), *aff'd.*, 308 F.2d 573 (1st Cir. 1962). *Cf.* Hooper v. Hartman, 163 F. Supp. 437 (S.D. Cal. 1958), *aff'd.*, 274 F.2d 419 (9th Cir. 1959). *But see* Jackson v. Wilson, 147 F. Supp. 296 (D.D.C. 1957).

152. 415 F.2d 991, 995-96 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970).

153. *See* text at note 124 *supra*.

154. 415 F.2d at 1000. The plaintiff lost on the merits, but even if he had succeeded he doubtless would not have been restored to active duty. He had been out

Resor,[155] the plaintiff sought a declaration that his conviction was invalid and a mandatory injunction ordering the Secretary of the Army to change his records. The court granted relief because of improper command influence, citing *Ashe*, *Gallagher*, and *Kauffman* as conclusively establishing jurisdiction.[156] In the third case, *Avrech v. Secretary of the Navy*, the court's jurisdiction went unchallenged.[157] The judgment granting relief was reversed on the merits by the Supreme Court, however, in a decision expressing uncertainty about federal court jurisdiction over such suits.[158]

Other circuits have reached no firm conclusions on whether servicemembers may challenge court-martial convictions in suits requesting declaratory and injunctive relief. The Fifth Circuit followed the District of Columbia Circuit in a decision that ignored jurisdictional difficulties.[159] While expressing some reservations, the Third Circuit left the jurisdictional issue unanswered.[160] With two

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of the service nearly eight years, and in almost all cases courts have been unwilling to compel the military to take back those unlawfully discharged. *See, e.g.*, Ingalls v. Zuckert, 235 F. Supp. 89 (D.D.C. 1964); Mercereau v. United States, 155 Ct. Cl. 157 (1961). A declaration of invalidity is therefore of little value unless accompanied by a mandatory injunction directing the correction of the plaintiff's records.

155. 455 F.2d 1345 (D.C. Cir. 1971).

156. 455 F.2d at 1348-49.

157. 477 F.2d 1237, 1238 n.1 (D.C. Cir. 1973), *revd. on other grounds*, 418 U.S. 676 (1974). As a result of his conviction the plaintiff was reduced in rank and briefly incarcerated. He requested a declaration that his conviction was constitutionally invalid and an order that the conviction be expunged from his record.

158. 418 U.S. 676, 677 (1974). *See* note 11 *supra*.

159. Cole v. Laird, 468 F.2d 829 (1972). The complaint requesting a writ of habeas corpus and appropriate declaratory and injunctive relief was filed while plaintiff was still in custody. Shortly thereafter, the unexecuted portion of the sentence was remitted and the plaintiff was released. In a footnote the court stated: "While this obviously moots the habeas corpus portion of the complaint, it does not change the underlying fact that Cole continues to have a record of a federal conviction. The remaining claims of the complaint were properly within the jurisdiction of the court. 28 U.S.C.A. §§ 1331, 1343, 1361." 468 F.2d at 830 n.1. Despite the release from confinement, habeas would still have been available and on that basis the court could have granted other appropriate relief. *See, e.g.*, Carafas v. LaVallee, 391 U.S. 234 (1968); Betonie v. Sizemore, 496 F.2d 1001, 1005 (5th Cir. 1974). Thus the case is distinguishable from actions solely for declaratory and injunctive relief. But the above quotation makes clear that the court concluded that it had the power to review courts-martial collaterally under its general federal question (§ 1331), civil rights (§ 1343), and mandamus (§ 1361) jurisdictional statutes.

160. Ragoni v. United States, 424 F.2d 261 (3d Cir. 1970). Interpreting the plaintiff's vague complaint "as an attempt to make a habeas-corpus-type collateral attack on his court martial conviction," the court stated:

> Such a right of action by way of declaratory judgment might be available when habeas corpus is foreclosed because the "in custody" requirement of the habeas corpus statute cannot be satisfied. Presumably, any action or inaction by the Correction Board would be irrelevant under any such theory. Moreover, if such a cause of action were recognized, it would probably allow some factual issues to be relitigated in the district courts in the manner of habeas corpus attacks on court convictions.

424 F.2d at 263-64. The court in Brown v. United States, 365 F. Supp. 328, 335-36, (E.D. Pa. 1973), *affd.*, 508 F.2d 618 (3d Cir. 1975), decided that relief other than mandamus to the Correction Boards was available in the Third Circuit.

brief, contradictory decisions to its credit, neither including significant jurisdictional analysis, the position of the Second Circuit is unclear.[161] The First Circuit has expressly disavowed jurisdiction,[162] but its cursory treatment of the issue occurred prior to *Kauffman*, *Homcy*, and *Avrech*; it is thus unclear whether it will maintain its position.

While several of these courts discussed article 76, almost none considered whether there were independent statutory bases for jurisdiction in suits requesting declaratory and injunctive relief. Unlike the habeas corpus and mandamus statutes, the Declaratory Judgment Act[163] does not confer jurisdiction on the federal courts.[164] Suits for declaratory or injunctive relief must therefore be based on one of the general jurisdiction statutes.[165] The civil rights statute, 28 U.S.C. § 1343(3), does not apply to challenges to federal action,[166] and the judicial review provisions of the Administrative Procedure Act,[167] which some courts have construed as a grant of federal court jurisdiction,[168] are specifically inapplicable to courts-martial.[169]

161. In a per curiam decision, United States v. Carney, 406 F.2d 1328 (2d Cir. 1969), the court refused to review a court-martial conviction, stating that "the determinations of the review boards are final and conclusive upon us and we lack jurisdiction further to consider this matter. *See* 10 U.S.C. Section 876; Davies v. Clifford, 393 F.2d 496 (1st Cir. 1968)." The court's citation of *Davies v. Clifford* seems improper, for that decision stated that declaratory relief was unavailable where the Correction Board already had granted relief, and not that declaratory (or mandamus) relief was unavailable when the Correction Board refused to act. *See* note 162 *infra*. In United States *ex rel.* Flemings v. Chafee, 458 F.2d 544 (2d Cir. 1972), *revd. on other grounds sub nom.* Warner v. Flemings, 413 U.S. 665 (1973), the court affirmed an order directing the Naval Correction Board to change the plaintiff's discharge to honorable. The district court's jurisdiction to entertain the suit was not challenged, *see* 330 F. Supp. 193, 195 (E.D.N.Y. 1971), and there is no indication that the Second Circuit or Supreme Court gave any thought to the jurisdiction issue. Relying on *Flemings*, the court in Williams v. Froehlke, 356 F. Supp. 591 (S.D.N.Y. 1973), *affd.*, 490 F.2d 998 (2d Cir. 1974) (relief denied), concluded that the Second Circuit approved of declaratory relief. *Accord*, Melvin v. Laird, 365 F. Supp. 511 (E.D.N.Y. 1973).

162. The plaintiff in Davies v. Clifford, 393 F.2d 496 (1st Cir. 1968), had his discharge changed to honorable by the Army Correction Board, but sought a declaration that the conviction itself was void—relief not available from the Board. Arguing that such a request amounted to direct review of the conviction, the court denied relief, stating that it had no appellate jurisdiction over courts-martial. The court did not consider whether declaratory relief would be available when mandamus to the Correction Board was possible, as in Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971).

163. 28 U.S.C. § 2201 (1970).

164. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55-56 (D.D.C. 1973). *See also* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).

165. *See, e.g.*, Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973) ("[T]he presumption in each instance is that a federal court lacks jurisdiction until it can be shown that a specific grant of jurisdiction applies."). *See generally* J. MOORE, FEDERAL PRACTICE ¶ 57.23 (1974).

166. *See, e.g.*, Brown v. Schlesinger, 365 F. Supp. 1204, 1207 n.1 (E.D. Va. 1973).

167. 5 U.S.C. §§ 701-06 (1970).

168. *See* Bard v. Seamans, 507 F.2d 765, 767-68 (10th Cir. 1974); Young v. United States, 498 F.2d 1211, 1218-22 (5th Cir. 1974). *But see* Arizona State Dept. of Pub. Welfare v. Department of Health, Educ., & Welfare, 449 F.2d 456, 464 (9th Cir. 1971), *cert.*

Moreover, it is doubtful that the mandamus statute would support a pendent claim for declaratory and injunctive relief.[170]

General federal question jurisdiction[171] is available to the servicemember advancing nonfrivolous claims of constitutional or statutory error, even where it is eventually determined that his allegations fail to state a cause of action.[172] Suits based on general federal question jurisdiction, however, must satisfy the current jurisdictional amount requirement of $10,000.[173] The initial hurdle in meeting this requirement is proving that the right or matter in controversy is capable of monetary valuation.[174] Few quantification problems arise when the

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denied, 405 U.S. 919 (1972); Zimmerman v. United States, 422 F.2d 326, 330-31 (3d Cir.), *cert. denied*, 399 U.S. 911 (1970); Pan Am. World Airways, Inc. v. CAB, 392 F.2d 483, 494 (D.C. Cir. 1968); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 532 (8th Cir. 1967); Chournos v. United States, 335 F.2d 918, 919 (10th Cir. 1964); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 58-59 (D.D.C. 1973).

169. 5 U.S.C. § 701(b)(1)(F) (1970). Arguably, the APA provisions do apply to civilian and military officials in a position to expunge records of convictions. This seems unlikely, however, for the result would be the liberal review of courts-martial, a result clearly meant to be avoided by the statute. The legislative history of the Administrative Procedure Act indicates, however, that the exclusion of courts-martial, military commissions, and military authority exercised in the field in time of war was to be the full extent of the military's exemption: "Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their other functions." S. REP. No. 752, 79th Cong., 1st Sess. 5 (1945). The Act does apply generally to the military. *See, e.g.*, Carter v. Seamans, 411 F.2d 767, 776 (5th Cir. 1969) (dictum), *cert. denied*, 397 U.S. 941 (1970); Etheridge v. Schlesinger, 362 F. Supp. 198, 200 (E.D. Va. 1973); Garmon v. Walker, 358 F. Supp. 206, 208 (W.D.N.C. 1973).

170. The plaintiff in Ragoni v. United States, 424 F.2d 261 (3d Cir. 1970), requested mandamus and declaratory relief. His request for mandamus to the Correction Board to change his record was denied because he failed to show that the Correction Board acted "arbitrarily or capriciously" in denying his claim. 424 F.2d at 263. Concerning the plaintiff's request for a declaratory judgment, the court noted that declaratory relief is available only in cases otherwise within the jurisdiction of federal courts. Federal question jurisdiction was unavailable in this instance because the requisite jurisdictional amount was lacking. "Moreover," stated the court, "even if 28 U.S.C. § 1361 (mandamus) were available as a jurisdictional basis for a declaratory judgment action, it is clear that the scope of review in such a case would still be whether the Correction Board acted arbitrarily in view of the record before it." 424 F.2d at 264. Since the plaintiff failed to make such a showing, the court left unanswered the novel issue whether nonmandamus relief is available for one successfully showing that a ministerial duty is due him.

171. The federal question jurisdiction statute, 28 U.S.C. § 1331(a) (1970), provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." On the jurisdictional amount problem, see text at notes 173-79 *infra*.

172. Hagans v. Lavine, 415 U.S. 528, 542-43 (1974); Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963); Bell v. Hood, 327 U.S. 678, 682 (1946). On the existence of a cause of action in this setting, see text at notes 180-92 *infra*.

173. *See* note 171 *supra*.

174. *See* McGaw v. Farrow, 472 F.2d 952, 954 (4th Cir. 1973); Kheel v. Port of New York Authority, 457 F.2d 46, 49 (2d Cir. 1972); Goldsmith v. Sutherland, 426 F.2d 1395,

matter concerns forfeited pay, fines, or pay lost due to a reduction in rank. In addition, courts have held that claims of probable diminution of future earnings to the extent of $10,000 satisfy the requirement,[175] and should similarly accept calculations of lost veterans' benefits and pension rights.[176] Problems arise, however, where the plaintiff's sole allegation is the deprivation of statutory or constitutional rights.[177] Although there has been some loosening of the jurisdictional amount requirement when constitutional rights are at stake,[178] it remains generally true that jurisdiction will not lie if the plaintiff's rights are incapable of accurate valuation.[179] The servicemember who receives a minor sentence and who cannot show sufficient monetary damage from his felony conviction record is thus probably foreclosed from declaratory and injunctive relief.

The most serious problem in suits for declaratory and injunctive relief is the absence of a clearly valid cause of action. Violations by federal officials of the Constitution or acts of Congress are not redressable under federal question jurisdiction unless the violated provisions expressly or impliedly created causes of action.[180] No

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1397 (6th Cir.), *cert. denied*, 400 U.S. 960 (1970); Rapoport v. Rapoport, 416 F.2d 41 (9th Cir. 1969), *cert. denied*, 397 U.S. 915 (1970); Rosado v. Wyman, 414 F.2d 170, 176 (2d Cir. 1969), *revd. on other grounds*, 397 U.S. 397 (1970). *But see* Spock v. David, 469 F.2d 1047, 1057 (3d Cir. 1972); Cortright v. Resor, 325 F. Supp. 797, 810 (E.D.N.Y.), *revd. on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

175. *See* Berk v. Laird, 429 F.2d 302, 306 (2d Cir. 1970), *cert. denied*, 404 U.S. 869 (1971); Schroth v. Warner, 353 F. Supp. 1032, 1036 n.9 (D. Hawaii 1973); Walsh v. Local Bd. No. 10, 305 F. Supp. 1274, 1275-76 (S.D.N.Y. 1969). *See also* Smith v. Whitney, 116 U.S. 167, 173 (1886). *Cf.* Eisen v. Eastman, 421 F.2d 560, 566-67 (2d Cir. 1969) (capitalized value of future rent reduction allowed).

176. *See* Hiss v. Hampton, 338 F. Supp. 1141, 1146 (D.D.C. 1972).

177. *See, e.g.*, Lynch v. Household Fin. Corp., 405 U.S. 538, 547 (1972); Goldsmith v. Sutherland, 426 F.2d 1395, 1397 (6th Cir.), *cert. denied*, 400 U.S. 960 (1970).

178. *E.g.*, Cortright v. Resor, 325 F. Supp. 797, 810 (E.D.N.Y.), *revd. on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972): "A monetary price can hardly be placed on the rights guaranteed by the First Amendment. . . . Free speech is almost by definition worth more than $10,000, so that the allegation of jurisdiction based upon 1331 ought not be subject to denial." *See* Schroth v. Warner, 353 F. Supp. 1032, 1036 (D. Hawaii 1973) (dictum). *Cf.* Breen v. Selective Serv. Local Bd. No. 16, 396 U.S. 460 (1970), *revg.* 406 F.2d 636 (2d Cir. 1969), *affg.* 284 F. Supp. 749 (D. Conn. 1968).

In recent years federal courts have found the jurisdictional amount requirement satisfied in suits to expunge records of unlawful arrests by the allegation that significant damages will result from the distribution of one's arrest record. *E.g.*, Menard v. Saxbe, 498 F.2d 1017, 1023 (D.C. Cir. 1974); Sullivan v. Murphy, 478 F.2d 938, 960-61 (D.C. Cir. 1973). *See also* Rogers v. Slaughter, 469 F.2d 1084 (5th Cir. 1973). *Cf.* Laird v. Tatum, 408 U.S. 1, 13 (1972). *But see* Paton v. LaPrade, 382 F. Supp. 1118 (D.N.J. 1974). Courts similarly may accept allegations of potentially serious damages of uncertain value flowing from an invalid court-martial conviction.

179. *E.g.*, McGaw v. Farrow, 472 F.2d 952, 954-55 (4th Cir. 1973); Goldsmith v. Sutherland, 426 F.2d 1395, 1397 (6th Cir. 1970); Shimabaku v. Britton, 357 F. Supp. 825, 826 (D. Kan. 1973). *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 547 (1972).

180. *See* Bivens v. Six Unknown Named Agents, 409 F.2d 718, 720-21 (2d Cir. 1969), *revd.*, 403 U.S. 388 (1971) (*see* text at notes 190-92 *infra*); Johnston v. Earle, 245 F.2d

common-law cause of action now exists to review court-martial error,[181] and, according to the Supreme Court, "[a]s respects the creation by the federal courts of common law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co. v. Tompkins*."[182] Nor are the civil-rights causes of action in 42 U.S.C. § 1983 applicable to unlawful federal action.[183]

Two lines of cases, however, indicate that a federal cause of action may exist to rectify constitutional errors and jurisdictional excesses of courts-martial.[184] The Supreme Court frequently extends relief to those injured by acts of government officials in excess of their express or implied powers.[185] The Court stated in *Stark v. Wickard*[186] that "[t]he responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."[187] The Court has granted relief in instances where the Administrative Procedure Act did not apply and where finality provisions purported to limit judicial review.[188] This cause of action redresses only unwarranted exercises of power, however, and therefore will not avail the servicemember who seeks review of nonjurisdictional constitutional error. The servicemember in this situation may rely on recent cases inferring causes of action

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793, 795-96 (9th Cir. 1957); Koch v. Zuieback, 194 F. Supp. 651, 656 (S.D. Cal. 1961), *aff'd.*, 316 F.2d 1 (9th Cir. 1963). *See also* United States v. Faneca, 332 F.2d 872, 875 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965).

181. *See* text at notes 88-89 *supra*. One possible exception is the suit for back pay in the Court of Claims. *See* text at note 90 *supra*.

182. Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).

183. *See* District of Columbia v. Carter, 409 U.S. 418, 424-25 (1973); Roots v. Callahan, 475 F.2d 751 n.1 (5th Cir. 1973) (dictum); Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1346 (2d Cir. 1972); Savage v. United States, 450 F.2d 449, 451 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972); La Rouche v. City of New York, 369 F. Supp. 565, 567 (S.D.N.Y. 1974).

184. A *state* cause of action against military authorities may suffice if the essence of the claim is the unconstitutionality of the federal statute under which the servicemember was convicted. *Cf.* Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). *But cf.* Puerto Rico v. Russell & Co., 288 U.S. 476 (1933). A state cause of action conceivably could be joined with a colorable request for mandamus under 28 U.S.C. § 1361 (1970) and come within the court's pendant jurisdiction. *Cf.* Hagans v. Lavine, 415 U.S. 528 (1974). If all else fails, the servicemember can claim that the remedy is an inherent power of federal courts. *Cf.* Tarlton v. Saxbe, 507 F.2d 1116, 1120, 1125 (D.C. Cir. 1974); Menard v. Saxbe, 498 F.2d 1017, 1023 (D.C. Cir. 1974) (the expungement of arrest records held by federal official is an inherent judicial power and not dependent on express statutory provision).

185. *See, e.g.*, Harmon v. Brucker, 355 U.S. 579, 581-82 (1958); Stark v. Wickard, 321 U.S. 288, 309-10 (1944); Philadelphia Co. v. Stimson, 223 U.S. 605, 621-22 (1912); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108 (1902).

186. 321 U.S. 288 (1944).

187. 321 U.S. at 309-10.

188. *See* notes 110-13 *supra*.

directly from constitutional provisions.[189] In *Bivens v. Six Unknown Named Agents*[190] the Supreme Court held that a fourth amendment violation by a federal agent acting under color of his authority gives rise to a cause of action for damages. Lower federal courts have not hesitated to extend *Bivens* beyond the fourth amendment.[191] Nor is the reach of these decisions limited to damage requests, for federal courts employ any appropriate remedy once a cause of action is found to exist.[192]

The Court in *Bivens* suggested, however, that courts should not infer causes of action when there exists a statutory remedy "equally effective in the view of Congress."[193] Since the deprivation of a servicemember's rights could have been fully redressed by an acquittal at his court-martial or a reversal on direct review, arguably the military court system is itself an effective alternative to a constitutional cause of action for nonhabeas relief in the federal courts. *Bivens* would be distinguishable under this view because there the suit was for damages for a violation of the plaintiff's fourth amendment rights, and it is clear that the plaintiff could not have been awarded the relief he sought in the context of a criminal suit in which he was the defendant. The servicemember, on the other hand, seeks only a declaration that his court-martial conviction is invalid (and the incidents flowing from such a declaration such as return of back pay and restoration of rank). To extend *Bivens* to him might imply, for example, the unlikely result that a civilian criminal defendant not in "custody" also has a cause of action for a declaratory judgment that his conviction is invalid, even though he could have received the same relief on direct review.[194]

189. A further possibility is the inference of causes of action from statutory provisions of the UCMJ that implement constitutional rights. *Cf.* J.I. Case Co. v. Borak, 377 U.S. 426 (1964). Such inference must be consistent with the evident legislative intent, and will not be made when the statute provides for a particular remedy or remedies, *see* National R.R. Passenger Corp. v. National Assn. of R.R. Passengers, 414 U.S. 453, 458 (1974), or when the omission of a remedy in the statutory framework is deliberate. *See* T.I.M.E., Inc. v. United States, 359 U.S. 464, 471 (1959).

190. 403 U.S. 388 (1971).

191. *See, e.g.*, Brault v. Town of Milton, No. 74-2370 (2d Cir. Feb. 24, 1975) (fourteenth amendment); Singleton v. Vance County Bd. of Educ., 501 F.2d 429, 433 (4th Cir. 1974) (fourteenth amendment); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (fifth amendment); Moore v. Koelzer, 457 F.2d 892, 894 (3d Cir. 1972) (fifth amendment); United States *ex rel.* Harrison v. Pace, 380 F. Supp. 107, 110 (E.D. Pa. 1974) (fifth amendment); Gardels v. Murphy, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974) (dictum) (all constitutional rights); Butler v. United States, 365 F. Supp. 1035, 1039-40 (D. Hawaii 1973) (first amendment).

192. *E.g.*, Bell v. Hood, 327 U.S. 678, 684 (1946); Donahue v. Staunton, 471 F.2d 475, 483 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); Dann v. Studebaker-Packard Corp., 288 F.2d 201, 211 (6th Cir. 1961).

193. 403 U.S. at 397. *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1547-50 (1972).

194. *See* Gajewski v. United States, 368 F.2d 533 (8th Cir. 1966), *cert. denied*, 386 U.S. 913 (1967).

If the military courts generally are not as "effective" as federal courts in the adjudication of constitutional rights, however, federal courts would be free to infer a collateral cause of action. Alternatively, the "effectiveness" of military review could be made to turn on whether the servicemember's constitutional claims are fairly considered, permitting the inference of a collateral remedy only where they are not. This position would respect the congressional decision to establish a separate military justice system while providing servicemembers with a chance to show that that system has not accorded them a fair hearing. It should be recognized, however, that the latter approach may mean that not all servicemembers who suffer the same constitutional deprivation will be entitled to a cause of action.

A third method of collaterally attacking court-martial judgments —a back-pay action in the Court of Claims—has been recognized for a century.[195] As with respect to suits for declaratory and injunctive relief, there is here no clearly valid cause of action to review court-marital proceedings. The long history of back-pay suits, however, supports the argument that a common-law action exists that was not precluded by article 76. While the Supreme Court in 1969 expressly reserved judgment on the validity of this argument,[196] dictum in *Councilman* suggests that such a cause of action does exist. The Court of Claims has read article 76 to limit its inquiry in back-pay suits to issues that "rise to a constitutional level,"[197] however, and in light of *Councilman* it could well conclude that even a more restricted inquiry is mandated.[198]

Since 1972 the Court of Claims has had the general power to order record changes and restoration to office incident to its power to render money judgments.[199] This expanded relief capability and the absence of a jurisdictional amount requirement might make the Court of Claims the most attractive forum for the servicemember seeking nonhabeas review. In two recent suits, the court has entertained claims of servicemembers seeking primarily the expungement of all record of their convictions, with incidental demands for the return of small fines.[200] Thus, a claim for a money judgment need not be the gravaman of the servicemember's compliant.

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195. *See* note 90 *supra.*

196. *See* note 11 *supra.*

197. McDonald v. United States, 507 F.2d 1271, 1277 (Ct. Cl. 1974); Artis v. United States, 506 F.2d 1387, 1391 (Ct. Cl. 1974). *See* Gallagher v. United States, 423 F.2d 1371, 1379 (Ct. Cl. 1970).

198. *See* text at notes 34-37 *supra.*

199. 28 U.S.C. § 1491 (Supp. II, 1972). The 1972 amendment gave the court the power, incidental to granting a money judgment, to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records . . . ."

200. Artis v. United States, 506 F.2d 1387 (Ct. Cl. 1974) ($80 fine); Jones v. United States, No. 435-73 (Ct. Cl. July 19, 1974) ($40 fine).

III. PROPOSALS

The military justice system could be improved by statutory changes in the jurisdiction of the military appellate courts and the federal courts reducing the need for, and the uncertainties surrounding, nonhabeas federal court review. The jurisdiction of the Courts of Military Review and the USCMA is presently limited to cases involving punitive discharge or confinement of at least one year;[201] convictions carrying lesser sentences receive no military appellate court review.[202] Scrutiny of the latter convictions by experienced appellate judges would doubtless reduce the number of constitutional errors reviewed by federal courts and increase confidence in the military justice system. Automatic review of all convictions, however, would unduly burden the military appellate courts.[203] A suitable compromise would be to amend article 66 of the UCMJ[204] to provide for mandatory review by the Courts of Military Review of all cases referred to it by the convening authorities (in addition to all cases presently subject to mandatory review), and discretionary review of all other court-martial convictions. The USCMA should retain discretionary review power over all cases decided by the Courts of Military Review.

Even with this amendment, however, a need would exist for limited nonhabeas federal court review without regard to amount in controversy.[205] Such review should take the form of a single post-

201. *See* note 67 *supra.*

202. *See* note 67 *supra.*

203. *See* note 67 *supra.*

204. 10 U.S.C. § 866 (1970).

205. The American Bar Association, in its study of criminal justice, has recommended that:

> the availability of post-conviction relief . . . not be dependent upon the applicant's attacking a sentence of imprisonment then being served or other present restraint. The right to seek relief from an invalid conviction and sentence ought to exist:
>
> (i) even though the applicant has not yet commenced service of the challenged sentence;
>
> (ii) even though the applicant has completely served the challenged sentence;
>
> (iii) even though the challenged sentence did not commit the applicant to prison, but was rather a fine, probation, or suspended sentence.

ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES, Standard 2.3, at 40-41 (Approved Draft 1968) [hereinafter ABA PROJECT]. The accompanying commentary states: "[T]his is made necessary by the application of multiple offender laws which upgrade the authorized or prescribed sentence for a present offense on the strength of the defendant's prior record. Parole consideration is likely to be influenced by the number of previous or concurrent convictions. Civil disabilities of more or less impingement frequently continue after a sentence has been completed." *Id.* at 43-44. As an alternative to federal court collateral review of state convictions, it has been suggested that a national court of appeals be established to review directly state convictions involving federal questions. *See* Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System,* 59 CORNELL L. REV. 597 (1974). For similar recommendations, see Mayers, *Federal Review of State Convictions: The Need for Procedural Reappraisal,* 34 GEO. WASH. L. REV. 615, 659-64 (1966).

conviction procedure with the scope of review limited as recommended above.[206] The procedure should grant federal judges the power to provide full relief—release from confinement, record changes, return of back pay and fines, restoration of benefits, and retrial[207]—and permit them when necessary to conduct a de novo inquiry into the plaintiff's court-martial proceeding, as is presently done in habeas corpus actions.[208] This would allow sufficient federal court review without requiring the compilation of a more formal record in summary and special courts-martial.[209] Exhaustion of military remedies should be required, to reduce the number of requests for federal court review and to minimize federal court interference with the military justice system.[210]

It is desirable to establish this review procedure in a single court for two reasons. First, forum shopping would be virtually eliminated. Unlike the habeas corpus petitioner, who generally must request relief in the district of his confinement,[211] the plaintiff seeking de-

206. *See* text at notes 65-69 *supra*.

207. One source of frustration for a number of servicemembers seeking collateral relief has been the inability to recover back pay in district courts because of the $10,000 maximum for claims against the government under the Tucker Act, 28 U.S.C. § 1346 (1970). *See* note 6 *supra*.

When injunctive relief is unduly coercive, a federal court may turn to the milder declaratory judgment, the issuance of which does not require that all the traditional equitable prerequisites for injunctive relief be met. *See* Steffel v. Thompson, 415 U.S. 452, 462, 471 (1974). Unless the declaratory judgment is to be a mere advisory opinion, however, the plaintiff may be entitled to a supplementary injunction to enforce it under 28 U.S.C. § 2202 (1970). Samuels v. Mackell, 401 U.S. 66, 72 (1971) (dictum); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1048 (2d ed. 1973).

208. *See* Townsend v. Sain, 372 U.S. 293 (1963); *Developments*, *supra* note 8, at 1113-53.

209. Requiring a more complete record may be too great a burden on the military. The multitude of small offenses punished in the military justice system must be handled quickly and informally. To this end the UCMJ does not require any significant trial record in cases before courts-martial that may not hand out sentences of punitive discharge or confinement in excess of six months. Trial records are prepared in general court-martial cases and must be prepared in special court-martial cases if a bad conduct discharge is to be imposed. UCMJ art. 54, 10 U.S.C. § 854 (1970); MCM, *supra* note 24, ¶¶ 82-83. If the convening authority is willing to forgo the possibility of imposing a punitive discharge, it may convene a special court-martial without compiling a verbatim transcript. *See generally* H. MOYER, *supra* note 36, at 577-78. Failure to prepare a verbatim record when one is required by the *Manual for Courts-Martial* usually constitutes reversible error. *See, e.g.*, United States v. Weber, 20 U.S.C.M.A. 82, 42 C.M.R. 274 (1970). Of the 31,587 persons tried by Army courts-martial during fiscal year 1972, 28,538 were tried by summary courts-martial and special courts-martial without the capacity to compile verbatim transcripts. ANNUAL REPORT, *supra* note 58, at 16. Granting federal courts the power to conduct de novo inquiries is essential if these informal proceedings are to be retained.

210. *See* note 13 *supra*.

211. 28 U.S.C. § 2241 (1970) provides that the writ of habeas corpus may be granted by federal judges "within their respective jurisdictions." Read originally to preclude federal courts from questioning the confinement of petitioners not within their district, *see* Ahrens v. Clark, 335 U.S. 188 (1948), the Supreme Court has recently reinterpreted the provision to require only that the issuing court have jurisdiction over

claratory or mandamus relief may sue in the most receptive forum.[212] Differences among the circuits on the availability and scope of nonhabeas review, the constitutionality of substantive and procedural military law, and the requirements of exhaustion all encourage forum shopping. Second, a single court would become expert in dealing with military law and with the governmental interests limiting military due process.[213] Ideally the court should be located in the District of Columbia. That location would of course be convenient for the government, and inconvenience to the plaintiff servicemember would not be excessive[214] since the military appellate courts from whose decisions the servicemember would be seeking relief also are presently located in the capital. Thus, post-conviction review power could be granted to the District of Columbia District Court or to the Court of Claims, which has already gained familiarity with military law from its experience with back-pay suits.

The proposed procedure should include a time limit (*e.g.*, one year), beginning with final disposition of the case by the military, after which applications for collateral relief would be rejected. (Exceptions could be made for excusable delay.) Although disabilities flowing from a punitive discharge and a conviction record continue throughout one's lifetime,[215] servicemembers must not be encouraged to wait until retrial becomes impossible before instituting collateral attacks. A time limit would provide finality, increase the feasibility and accuracy of retrials, reduce record-keeping difficulties, and facilitate thorough post-conviction review by ensuring that records and witnesses will remain fresh. While the equitable

the custodian. *See* Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 495 (1973). A collateral attack on a federal sentence must be brought in the sentencing court, rather than in the district where the prisoner is confined. 28 U.S.C. § 2255 (1970).

212. Under the general venue provisions, civil actions not involving real property, in which each defendant is an officer or employee of the United States acting in his official capacity, may except as otherwise provided be brought in any judicial district in which the plaintiff resides. 28 U.S.C. § 1391(e) (1970). Service of process poses little problem because the several service branches have significant ties to most federal judicial districts.

213. Leading Supreme Court cases developing standards of civilian due process have stressed that, in determining the procedural rights likely to be adversely affected by governmental action, a court must weigh not only the seriousness of the harm but also the countervailing governmental interests. *See* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Hannah v. Larche, 363 U.S. 420, 442 (1960).

214. In Noyd v. Bond, 395 U.S. 683, 696-98 (1969), the Supreme Court rejected an argument that a convicted servicemember should not be required to exhaust a possible review by the USCMA in Washington, D.C., prior to seeking habeas corpus because of the distance involved. The Court stated simply: "[T]he fact that Captain Noyd is confined far from Washington, D.C., is not enough, standing alone, to permit him to circumvent the military court system." The petitioner made no showing that it was impossible for him to obtain a lawyer willing to present an appropriate and timely application before the USCMA.

215. *See* text at notes 71-73 *supra*.

doctrine of laches might accomplish the same ends, courts reviewing court-martial convictions have thus far shown no inclination to employ it.[216]

If these proposals for statutory change are not adopted, two jurisdictional extensions could be made judicially to augment intra-service appellate opportunities and to increase the availability and certainty of federal court review. First, the Courts of Military Review and the USCMA could expand their jurisdiction under the All Writs Act to embrace all court-martial convictions. That Act grants congressionally established courts, including these military courts,[217] the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions."[218] The USCMA at one time indicated that it could use this power to accord relief to any convicted servicemember, whether or not his sentence was serious enough to qualify for direct appellate review, thus minimizing the need for resort to federal courts.[219] Shortly thereafter, however, the court expressly disavowed the power to expand its jurisdiction in this manner.[220] The latter

216. *See, e.g.*, Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971) (1944 conviction); Angle v. Laird, 429 F.2d 892 (10th Cir. 1970), *cert. denied*, 401 U.S. 918 (1971) (1948 conviction); Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969) (1945 conviction). *But cf.*, Brundage v. United States, 504 F.2d 1382 (Ct. Cl. 1974) (laches invoked in suit for back pay lost through an administrative error). In eliminating the custody requirement in its proposed standards, the American Bar Association recommended:

> (a) It is unsound to fix a specific time period as a statute of limitations to bar post-conviction review of criminal convictions. The circumstances that will occasion applications for post-conviction relief are too many and varied to permit of one useful limitation period.
>
> (b) It should be considered an abuse of process for a person with a tenable or meritorious claim for post-conviction relief deliberately and knowingly to withhold presentation of that claim until an event occurs which he believes prevents successful re-prosecution or correction of the vitiating error. An applicant who has committed such abuse of process may be denied relief on his claim. Courts should not be required to deny relief in all such cases. Abuse of process ought to be an affirmative defense to be specifically pleaded and proved by the state.

ABA PROJECT, *supra* note 205, Standard 2.4, at 45. *Cf.* Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

217. *See* Noyd v. Bond, 395 U.S. 683, 695 n.7 (1969). *See also* United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966); United States v. Draughon, 42 C.M.R. 447, 451 (1970).

218. The All Writs Act, 28 U.S.C. § 1651(a) (1970) provides in full: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

219. *See* United States v. Bevilacqua, 18 U.S.C.M.A. 10, 11-12, 39 C.M.R. 10, 11-12, (1968) ("Article 67 does not describe the full panoply of power possessed by this Court. . . . [T]his Court is not powerless to accord relief to an accused who has palpably been denied constitutional rights in any court-martial; . . . an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary.").

220. *See* United States v. Snyder, 18 U.S.C.M.A. 480, 483, 40 C.M.R. 192, 195 (1969) ("Our jurisdiction to hear appeals, no matter how well-founded, is set out by Congress in [UCMJ, art. 67, 10 U.S.C. § 867 (1970)]. We cannot by judicial fiat enlarge the scope of our appellate review . . . .").

stance accords with the prevailing view that the All Writs Act confers no jurisdiction.[221] Nevertheless, Congress arguably intended the military appellate courts to supervise the entire court-martial system; while Congress specifically granted them jurisdiction over convictions of a certain severity,[222] there was perhaps no negative implication that convictions resulting in lesser sentences were beyond their supervisory powers. If this argument is accepted, military appellate courts could entertain petitions for relief from all servicemembers, although the scope of review under the available writs would be narrower than on direct appeal.[223]

The second possible judicial change involves increasing the availability of habeas corpus. Review could be made available to unincarcerated servicemembers who suffer the legal and social disabilities of punitive discharges by expanding the definition of "custody."[224] It is presently well established that a convicted individual is not "in custody" when he has served his sentence and faces no restraint on his physical liberty resulting from his conviction.[225] Recent cases, however, suggest that in defining "custody" the Supreme Court is placing less emphasis on physical restraint and more on the civil disabilities that attach to convicted persons.[226] Arguably, the disabil-

221. *See* Commercial Security Bank v. Walker Bank & Trust Co., 456 F.2d 1352, 1355 (10th Cir. 1972); Brittingham v. Commissioner, 451 F.2d 315, 317 (5th Cir. 1971); Morrow v. District of Columbia, 417 F.2d 728, 732-34 (D.C. Cir. 1969).

222. *See* note 67 *supra*.

223. The writs are viewed as extraordinary remedies to be used within the sound discretion of the court. *See, e.g.*, Morrow v. District of Columbia, 417 F.2d 728, 735-36 (D.C. Cir. 1969). *See also* Hayakawa v. Brown, 415 U.S. 1304, 1305 (Douglas, Circuit Justice, 1974); Will v. United States, 389 U.S. 90, 95 (1967); Dubnoff v. Goldstein, 385 F.2d 717, 722 (2d Cir. 1967).

224. Kanewske v. Nitze, 383 F.2d 388, 389 (9th Cir. 1967), held that the recipient of a bad-conduct discharge was not in "custody" within the meaning of the habeas statute.

225. *See, e.g.*, Morgan v. Juvenile & Domestic Relations Court, 491 F.2d 456, 457 (4th Cir. 1974); Mason v. Anderson, 357 F. Supp. 672, 677 (W.D. Okla. 1973); Downey v. Cox, 307 F. Supp. 227, 229 (W.D. Va. 1969). *See also* United States *ex rel.* Dessus v. Pennsylvania, 452 F.2d 557, 560 (3d Cir. 1971), *cert. denied*, 409 U.S. 853 (1972) (suspended sentence not "custody"); Whorley v. Brilhart, 359 F. Supp. 539, 541-42 (E.D. Va. 1973) (habitual traffic offender ordered not to drive on state highways for ten years—not "in custody"). *But see* Walker v. Dillard, Mem. Dec. No. 73-1108 (4th Cir.) (unreported), *on remand*, 363 F. Supp. 921 (W.D. Va. 1973) ($25 fine and 30-day suspended sentence satisfies "custody"); Settler v. Yakima Tribal Court, 419 F.2d 486, 490 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970) (fine or suspension of fishing rights satisfies "custody") ("The availability of habeas corpus appears particularly appropriate where the petitioner, although not presently in physical custody, has no other procedural recourse for effective judicial review of the constitutional issue he raises.").

226. In Hensley v. Municipal Court, 411 U.S. 345 (1973) (habeas petitioner "in custody" despite his being at large on his own recognizance pending execution of sentence), the Court stated: "Since habeas corpus is an extraordinary remedy . . . its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are *neither severe nor immediate*." 411 U.S. at 351 (emphasis added). The disabilities flowing from a bad-conduct discharge arguably are "severe" or "immediate" within the meaning of this dictum. The Court suggested

ities of a punitive discharge sufficiently restrict the servicemember's social and economic liberty to fall within a definition of "custody" consistent with the Court's shift in emphasis.

Neither of these judicial changes is likely to be made, however, for the USCMA has consistently refused to expand its jurisdiction by issuing extraordinary writs,[227] and federal courts in habeas actions have so far evidenced little inclination to abandon a requirement of at least minimal physical restraint.[228] Even if accomplished, these judicial changes would not satisfactorily achieve the goal of the statutory proposals, which is to reduce the number of cases in which federal court review is needed and to provide federal courts with sufficient, but not excessive, power to perform their role in ensuring that courts-martial employ fair procedures within their constitutionally limited jurisdiction.

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in an earlier case that restraints are sufficient to constitute "custody" if they "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." Jones v. Cunningham, 371 U.S. 236, 243 (1963) (paroled prisoner "in custody"). *Cf.* Carafas v. LaVallee, 391 U.S. 234 (1968). The *Jones* decision was relied upon by a federal district court that held that a petitioner was in "custody" despite his having completed his sentence, since "he nonetheless will suffer disabilities and restraints on his liberty as a result of his having been convicted." Glover v. North Carolina, 301 F. Supp. 364, 367 (E.D.N.C. 1969) (noting state prohibitions against convicted felons entering various professions or holding public office). *But see* Westberry v. Keith, 434 F.2d 623 (5th Cir. 1970) (person not in custody after suffering a fine and revocation of a driver's license); United States v. Flanagan, 305 F. Supp. 325, 326-27 (E.D. Va. 1969) (continuing disabilities sufficient to negate mootness, but not to establish "custody").

227. *See, e.g.*, Gnip v. Barrineau, 22 U.S.C.M.A. 668 (1973); Osborne v. United States, 21 U.S.C.M.A. 671 (1972). Judge Duncan, however, seems willing to expand the court's jurisdiction under the All Writs Act, and has dissented from the denial of relief in several instances. *See, e.g.*, Anderson v. Hamilton, 22 U.S.C.M.A. 664, 664 (1973).

228. *See* text at note 225 *supra*. In the two leading Supreme Court cases emphasizing civil disabilities the Court stressed that the petitioners suffered some physical restraint. *See* Hensley v. Municipal Court, 411 U.S. 345, 351 (1973); Jones v. Cunningham, 371 U.S. 236, 242 (1963).